

## MINUTES

### PLANNING COMMITTEE

September 3, 2014

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Tim Bynum, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, September 3, 2014, at 9:06 a.m., after which the following members answered the call of the roll:

Honorable Mason K. Chock, Sr.  
Honorable Ross Kagawa  
Honorable JoAnn A. Yukimura  
Honorable Tim Bynum  
Honorable Gary L. Hooser, Ex-Officio Member  
Honorable Jay Furfaro, Ex-Officio Member

Excused: Honorable Mel Rapozo

Minutes of the August 20, 2014 Planning Committee Meeting.

Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Yukimura, and carried by a vote of 4:0:1 (*Councilmember Rapozo was excused*), the Minutes of the August 20, 2014 Planning Committee Meeting was approved.

The Committee proceeded on its agenda item, as follows:

PL 2014-02                      Communication (07/23/2014) from Councilmember Rapozo, requesting the presence of the Director of Planning to provide a briefing on the Planning Department's efforts to enforce the Transient Vacation Rental ("TVR") ordinance and deal with the various enforcement issues raised by the public and Council.  
**(This item was Deferred.)**

Committee Chair Bynum:                      Chair will entertain a motion to receive. Yes, Councilmember Kagawa.

Councilmember Kagawa:                      Thank you, Chair. I hope we can consider deferring this item because Councilmember Rapozo is absent again and hopefully he will be here in two (2) weeks.

Committee Chair Bynum:                      I know the Planning Director was prepared. I just was not aware so that is fine with me. It is his item, so, Chair will entertain a motion to receive. If there is no discussion, let us see if there is public testimony.

Councilmember Yukimura:       Defer.

Committee Chair Bynum:       To defer, I mean. Is there anyone who wanted to speak on this item? Seeing none.

Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Chock, and carried by a vote of 4:0:1 (*Councilmember Rapozo was excused*), PL 2014-02 was deferred.

Bill No. 2461, Draft 1   A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8, KAUAI COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE (*Amendments to the Shoreline Setback Ordinance*)  
**(This item was Deferred.)**

Councilmember Kagawa moved for approval of Bill No. 2451, Draft 1, seconded by Councilmember Yukimura.

Committee Chair Bynum:       It is my understanding that the committee has met. We have a lot of supporting documents and so I am not sure if the intention is to vote on amendments today but certainly do an outline of them. I will yield the floor to Councilmember Yukimura and look for your advice about how to proceed.

Councilmember Yukimura:       Thank you, Mr. Chair. I am happy to report that the working group has completed its work and the result before you is the Floor Amendment dated September 3, 2014. We want to take the time today to explain these amendments and have a robust discussion on them, but I will be asking for a deferral so that everyone will have some time to absorb the proposal and talk to people that they want to talk to and ask questions at this meeting and after the meeting so that come our next committee meeting in two (2) weeks, we will be ready to vote on these items. With the approval of the Chair, that is how we would like to proceed.

Committee Chair Bynum:       Thank you very much for that. I appreciate it because I started working on this quite intensely yesterday but not prepared to vote so that is a great process. Then it would be the Chair's intention to hold public comment until after any presentations if that is okay with the Committee. With that, we will suspend the rules and you wanted to...is there a presentation?

There being no objections, the rules were suspended.

Councilmember Yukimura: I want to try going through this section by section but I would like to have upfront Ruby Pap, who has a presentation on the shoreline setback process; Caren Diamond, who is part of the group, Mike Dahilig and Max Graham, so that they can help me explain if there are any questions or additions to make because this was a group effort. So we need one (1) more chair please, staff. Thank you, Scott, sorry. If we can get five (5) people...or else...can we get five (5) chairs?

We also have Ka'aina Hall joining us. Max, will you join us please. Ruby, can you take the front seat because you will be making the presentation. So we are looking at these floor amendments identified as Floor Amendment number 1 dated September 3, 2014 and the highlighted sections or words are the proposed wording. Where the brackets are highlighted that is the proposed deletions from Bill No. 2461, Draft 1, which is the version that is pending on the floor right now and the proposal is to amend that draft 1 with the work that has come out of the working group. I will just run you through it. I see Mr. Shigemoto and Chris Conger here. They are also part of the working group and I think we will call you up on an as needed basis since we have a full house in front of us. I am going to just start. If you would begin with me on page 1, we are deleting the applicability section. I want to acknowledge Carl Imparato's input that we have tried to address. The applicability section in the draft 1 was based on a structure and Carl pointed out that if we exempted the structure based on whatever specifics that structural proposal included, would we be exempting the land on which it is? That was a major problem. So instead, we went back to what the original existing law says, where it is applicable to all abutting shorelines structures and even to non-abutting shoreline structures, but we did put a proviso stating if it is beyond five hundred feet (500'), then we did not think it would be affected by coastal processes so we did put a bright line there. In the case of non-abutting...non-abutting parcels are the ones where there is just a road and you can recall several in Hā'ena. I acknowledge the presence of David Arakawa who was also part of the group. Coming back to this non-abutting, when non-abutting properties are those where there is just a road in front of the parcel so that it can be affected by high wave action or there is just a small sliver, a strip of a property, and then the property that is non-abutting which can also be affected by coastal processes and shoreline erosion so that is why we are including both abutting and non-abutting with a limitation of five hundred feet (500'). In the case of non-abutting shoreline, it is approximately five hundred fifty feet (550') because the owner of the abutting shoreline may not allow us to do a certified shoreline, or may not want to do a certified shoreline.

Committee Chair Bynum: Councilmember Yukimura, can you yield for a question from the Chair?

Councilmember Yukimura: Yes.

Council Chair Furfaro, and ex-officio member: Point of clarification. Are you now saying that the structures have consideration up until the point that they are at least five hundred feet (500') from the shoreline?

Councilmember Yukimura: We are talking about lands in this case. We are not talking about structure.

Council Chair Furfaro: No, you are basically making reference, from Carl's...

Councilmember Yukimura: Well he raised the question that if we...

Council Chair Furfaro: I have not even finished my question.

Councilmember Yukimura: I am sorry. Go ahead.

Council Chair Furfaro: No, I will wait. I am a non-committee member. I will wait till later.

Councilmember Yukimura: Chair, I think your question...

Council Chair Furfaro: I will wait till later.

Councilmember Yukimura: Okay. I just want to clarify that the original proposal we made in the last Committee meeting had the applicability section based on structure and Carl pointed out the un-workability of it so we went back to lands that the shorelines, this law would be applicable to lands but we did put a limit of five hundred feet (500') because we feel that beyond five hundred feet (500') the chances of being affected by erosion or wave action is very small or nil.

Committee Chair Bynum: May I ask a clarifying question?

Councilmember Yukimura: Go ahead.

Committee Chair Bynum: I understand it applies to lands but basically under this amendment, the law would not apply to any new activity that happened more than five hundred feet (500') beyond the shoreline on abutting and non-abutting properties, correct?

Councilmember Yukimura: Correct.

Committee Chair Bynum: So did you want to follow-up on that, Chair?

Council Chair Furfaro: No, I will wait.

Committee Chair Bynum: Okay, thank you very much.

Councilmember Yukimura: And I was starting to say that the five hundred fifty feet (550') is an approximation because we anticipated that we might have problems getting a certified shoreline from the owner that owns the property between the shoreline and the applicant's lands so we have...this is how we have tried to address that question. The next section on page 2; prohibited activities. This is where we have included activities because they are part of the Special Management Areas (SMA) authorizing law the Hawai'i Revised Statute (HRS) and so we wanted to be consistent with State statute. But we also felt that other activities should be better regulated by the SMA permit process and we were supposed to have an opinion on activities from the County Attorney. I believe we were waiting Councilmember Rapozo's approval to allow that to be available to members of the public but it is a County Attorney's opinion addressing the legality of excluding activities from this Shoreline Setback Law if it can be covered by SMA law. I want to invite members of the working group to interrupt me if I am doing something inaccurate. If it is about arguments one way or the other, I want to wait till later to have those arguments. What is the status of the County Attorney's opinion, Peter Morimoto?

PETER MORIMOTO, Legal Analyst: It needs to be voted on by the Council.

Councilmember Yukimura: Is it on the agenda?

Mr. Morimoto: No.

Councilmember Yukimura: Has Councilmember Rapozo given approval?

Mr. Morimoto: Not to my knowledge.

Councilmember Yukimura: So we need to get his approval to put it on the agenda for release at our next Council meeting which is next week so that we can all have that opinion and the public can have that opinion as well.

Committee Chair Bynum: I would just like to interject for the record because Peter was not on the microphone that the County Attorney has advised that this opinion still requires Council action to release to the public, correct? Thank you.

Councilmember Yukimura: And so we wanted to have this all available for our discussion, but since it is not available today, I am asking that it be put on the agenda for next week's Council meeting, so that we can have it at our next Committee meeting in two (2) weeks. Thank you.

Council Chair Furfaro: Excuse me, first of all, to get clarity of our procedure.

Committee Chair Bynum: Council Chair Furfaro.

Council Chair Furfaro: Thank you, Councilmember Bynum. I do not think that some of us have even see Mr. Rapozo's...

Councilmember Yukimura: The County Attorney's opinion?

Council Chair Furfaro: To ask to put it on the agenda to see it and to release it all in the same day seems, to me, very challenging for some of the Councilmembers that would like to digest the legal opinion. That is my point.

Councilmember Yukimura: We will try to get Councilmember Rapozo's permission to give it to Councilmembers prior to the meeting. It is my understanding that once the matter is before the body, a County Attorney's opinion to any specific Councilmember actually...the opinion actually goes to the whole body. Councilmember Rapozo had a disagreement with that, and to honor his concerns we want to just get his approval first.

Council Chair Furfaro: To honor his concerns a message was sent over to the County Attorney to get clarification on that opinion. When it is released, is it released by the time it comes on the agenda? Does it still require the approval of the requesting Councilmember? I am still trying to get clarification on that.

Councilmember Yukimura: Do the County Attorneys have an answer to that question today? Yes or no?

Committee Chair Bynum: If we are going to answer questions, we really should have it on the public record so...

Councilmember Yukimura: No. This is a legal opinion regarding this but we will...

Council Chair Furfaro: The legal opinion went over in writing from the Chairman of the Council.

Councilmember Yukimura: I understand and I was asking if...

Council Chair Furfaro: And when we get it back, I will share it with all of you.

Councilmember Yukimura: Okay, fine. May I proceed?

Committee Chair Bynum: Yes, you may proceed and let me just say that this issue about release of opinion is in our Council rules and I think that the Chair is trying to make sure we are consistent. I recognize for myself the need to get this available to everyone in this circumstance but it is kind of...you have made your request of staff and we will see how it goes from there. If you would like to proceed.

Councilmember Yukimura: Thank you. Okay, so Section 3 is just a typo. Section 4 is removal of these words which are repetitive. Section 5 is the major heart of the law and because it is about how shoreline setbacks are determined and we have created, at the request of the Planning Department, two (2) so-called bright lines where cases would be exempt from a shoreline setback determination. Thank you, Ian, for getting up close. You will see Section 8-27.3(a)(1) is the first bright line and it has three (3) criteria.

The first criteria is, "where the proposed structure or subdivision is located outside of the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), V or VE flood zones," and these are all conjunction related, so all three (3) have to occur for this exemption to apply. "(B) the proposed structure or subdivision is located at an elevation which is thirty feet (30') above mean sea level or greater; and, (C) the applicant can demonstrate to the satisfaction of the Planning Director that the property is clearly adjacent to a rocky shoreline," which is carefully defined in definitions, but there is an addition to the requirement of defining rocky shoreline such, "that it will not affect or be affected by coastal erosion or hazards." I think the definition of rocky shoreline can be found in the original Bill or sorry but this large...Peter, please make sure that all working members have this. This is not numbered. It needs to be numbered but anyway the definition is somewhere in here and we can go over it if people want to; rocky shoreline. Let me just finish, that is one (1) exemption.

The second exemption is an exemption that is in the current law. It is in the current law as applied to, abutting, but I think the Planning Department needs it also to be applied to...no sorry, non-abutting but it also needs to be applied to abutting. So this is "B" on page 3, unless otherwise provided in subsection (A) above no shoreline setback shall be established...I am sorry... it is number 2 above. That is the second exemption. "In cases where the applicant can demonstrate to the satisfaction of the Planning Director that the applicant's proposed structure or subdivision will not affect beach processes, impact beach access, or be affected by or contribute to coastal erosion excluding natural disasters." This wording comes from the existing law. Yes, go ahead, Ka'aina.

KA'AINA HULL, Planner: That is not an existing law. That is being proposed.

Councilmember Yukimura: Can you say that again please?

Mr. Hull: To clarify that, that section actually is not in the existing law right now. It was originally proposed from what came over to Council from the Planning Commission, but that is not an existing law right now. It is proposed by the Planning Department, the Commission accepted it, and it was forwarded to the Council but it is not an existing law right now. And also for clarification just since we are on the subject too, the bright line exemption was not a departmental request. We are kind of neutral on that...

Councilmember Yukimura: Thank you. That is true.

Mr. Hull: Thank you.

Councilmember Yukimura: Scott, I would like to put this wording up, if possible. I think it would help people in the audience and in the public. Then I believe, "B" on page 3, is just a rewording. It does not change the meaning of the provision which requires that any shoreline setback line be established based on a certified shoreline issued within twelve (12) months.

Committee Chair Bynum: Councilmember Chock.

Councilmember Chock: Clarifying question. On number 2, under the purview of the Planning Director it says, "not limited to, proximity to the shoreline..." How do we define proximity?

Councilmember Yukimura: I am sorry, which one are you referring to?

Councilmember Chock: Number 2, last paragraph that you read.

Councilmember Yukimura: On page 3 the second bright line exemption or the second exemption?

Councilmember Chock: The factors to be considered shall include but not limited to proximity to the shoreline. So can you explain what that amounts to?

Councilmember Yukimura: Basically, it is saying that part of the factors that are to be considered by the Planning Director is the proximity of the structure to the shoreline. So if it is four hundred fifty feet (450') or four hundred twenty-five feet (425'), taking into account all of the other things, topography, if it is five feet (5') high or above mean twenty-five feet (25') high, et cetera, those all need to be considered in determining that it will not be affected by coastal processes or coastal erosion.



Councilmember Chock: Okay so just to be clear when it talks about the proximity to the shoreline, it is a specific distance that we are talking about?

Councilmember Yukimura: No because structures can be located at all distances from zero feet to five hundred feet (0' – 500'). That would be one (1) of the factors that the Planning Director will consider in deciding whether or not the structure will be affected by coastal erosion or coastal hazards.

Councilmember Chock: Thank you.

Committee Chair Bynum: Councilmember Hooser.

Councilmember Hooser, an ex-officio member: Just a brief follow-up. That same paragraph and the preceding one, "C," starts out "the applicant can demonstrate to the satisfaction of the Planning Director," so in both those cases, it is essentially up to the discretion of the Planning Director. So, different Planning Directors may have come to different conclusions. I just want to point that out because it is a discretionary item that they need to take these into consideration but by the end of the day, the Director makes a decision of how he or she feels appropriate. So there is not clear...it is not like check boxes where you have to do all of these things and then this happens. This is a discretionary decision?

Councilmember Yukimura: Yes, and it is discretionary because the law cannot anticipate every single instance of an application and so if it is four hundred fifty feet (450'), it is still within five hundred feet (500'). I think actually Tom Shigemoto can point out some of the properties in Kuku'iula that are way above wave action or coastal action but they come within the applicability were in doing the applicability, we did a broad applicability so that we could catch everything that might be affected, but then we have to narrow it down because some are clearly are not within the purpose of the act which is protection against coastal hazards and coastal erosion.

Committee Chair Bynum: Councilmember Hooser.

Councilmember Hooser: Just a brief follow-up. Is there any provision to appeal the Director's discretion?

Councilmember Yukimura: Yes, there is and we will talk about that further down in the law.

Councilmember Hooser: Okay, thank you.

Councilmember Yukimura: So if we continue the next big change is...I do not know that it is...yes we did make changes so is the actual way to determine

shoreline setbacks. There is a formula that is based on a lot of scientific study and data and I think what I will do now is ask Ruby to do her presentation because Ruby Pap, and you can introduce yourself over the...from Sea Grant has this presentation to help us all understand how this law is being proposed.

RUBY PAP, Extension Agent at the University of Hawai'i Sea Grant: Aloha, Committee Chair Bynum and Committee Members, my name is Ruby Pap, and I am a Coastal Land Use Extension Agent with the University of Hawai'i (UH) Sea Grant College Program. I have been working with the Planning Department for about two and a half (2.5) years now and I am available to the rest of the County, coastal hazards and other coastal management technical issues and technical assistance. Today, I am going to be presenting just as Councilmember Yukimura described and explanation of these technical aspects of the Shoreline Setback calculation and again this is once you make it through the door you are not exempt. This is the process that you go through and I will be talking about the science and the techniques behind that.

Just a little overview, as stated in the findings and purpose section of the Ordinance and the proposed amendments, the Ordinance purpose is to address erosion waves, coastal flooding, and wind. However, the details of the setback calculations, when you get into the nitty-gritty, are based on an erosion rate formula. There are two (2) formulas; an erosion rate formula and an average lot depth formula (i.e. the size of the lot in question). Using these two (2) types of calculations can, by default, account for those other hazards such as wave inundation, flooding, wind, especially combined with other programs within the County such as the flood program and the building program. While these other programs deal with building design and elevation the overall philosophy of a shoreline setback Ordinance is based on sighting of the structure and you must setback far enough to account for future erosion and other uncertainties. So launching into the first formula, that is the erosion rate formula. The Kaua'i Coastal Erosion Study, which is shown here, provides the foundation for calculating scientifically based shoreline setbacks. The study was completed for Kaua'i in 2012 by Dr. Chip Fletcher at UH. The current law in place now is actually, I guess, considered an interim ordinance that was waiting on the final publication of the study so the current amendments actually one (1) of the big impetus for this for this amendment is to formally incorporate this study into the law. So what this shows here is the shoreline change map, just an example. Basically historical shorelines were mapped by Chip Fletcher and his coastal geology group and these were mapped over a century since 1927 to 2006 and these shorelines can be and they are mapped from aerial photographs and T-sheets. These shorelines can be seen with these squiggly lines here. Now the changes in shoreline position over time are measured between those shorelines they are measured every twenty (20) meters along the shore and that is how you get the shoreline change rate or what we often refer to as an erosion rate which is shown here in red. So in addition there are also

two (2) types of lots that basically need to be considered in the Ordinance. Lots that were included in the coastal erosion study and lots that were not included in the coastal erosion study. So there is just an example. The Kaua'i Coastal Erosion Study looked at sandy shorelines only so only those with sandy shorelines use the erosion rate data as part of the setback calculation. I will go over both of those examples coming up. For lots that are included in the Kaua'i Coastal Erosion Study we are going to refer back to this table quite a bit. It is in the Section 8-27.3c of the proposed amendments. It is also slide number 6, if you have the PowerPoint in front of you. I am not sure I got the latest and greatest information into this PowerPoint slide but it is the same thing. I think they might have deleted some extraneous wording in there like the word "feet" or something but it is the same concept so I apologize for that. I did this PowerPoint before I saw the latest draft. Lots included in the erosion study have a setback calculation that is based on an erosion rate and on the size of the lot in question. I am going to go through this in subsequent slides but just in quick overview. Lots that are less than one hundred forty feet (140'), because they are small they are just going to have this erosion rate formula. Forty feet plus seventy times the annual coastal erosion rate plus twenty ( $40' + 70 \times \text{the annual coastal erosion rate} + 20$ ) and I will go into that in a minute. Larger lots that may have room to setback further are going to take the greater of the erosion rate formula or the average lot depth formula which is here. So the average lot depth formula is here and here. That is a part of that formula the one hundred feet (100') from the shoreline and I am going to go over this. I am going to split this apart now but I just wanted to give you an overview and we are going to keep returning to this so you can see where we are at as we go through it. Again, you have this slide 6 in front of you if you want to keep referring to it.

Starting with that erosion rate setback formula that I just described, the setback equals forty feet (40'), plus seventy (70) years, times the annual coastal erosion rate, plus twenty (20). So if you take an example, if you look at those maps and you find someone is proposing a development in front of a specific transect the average erosion rate is zero point seven feet (0.7') per year. You take forty plus seventy times point seven add twenty and you get one hundred nine feet ( $40 + 70 \times 0.7 + 20 = 109$ '). That is your erosion rate base setback. Now the graphic here that I am showing, I apologize it is blurry, you might be able to read it better, maybe not so I am going to describe it. It is just a nice visual example of a setback. Here you have the current shoreline. You have your erosion rate based setback, which is here. Then you have this additional setback to account for sea level rise and other uncertainties which I am going to describe in a moment and then that gives you an adequate setback to protect a structure for its economic life. It is also showing elevation here so the flood department has certain requirements to elevate structures as well for flooding. This on the bottom just shows how this works. In the future, let us say seventy (70) years down the road, assuming this all...based on the science should give you seventy (70) years worth of protection. So the shoreline

is retreated back, you have your structures here and maybe time to reevaluate at that point, seventy (70) years down the road.

Committee Chair Bynum: I am sorry. Council Chair Furfaro.

Council Chair Furfaro: If I had one hundred forty foot (140') lot in depth, I will end up with basically thirty-one feet (31') to build out?

Ms. Pap: Yes.

Council Chair Furfaro: Did you folks anticipate what that will then do to appraise values of those lands for the County, for tax rates?

Ms. Pap: Well that was the whole process and we may have to defer to the Attorneys but there is a variance process that will be described probably a little bit later that accounts for the smaller lots.

Council Chair Furfaro: I just want to make sure that I understand.

Ms. Pap: Definitely.

Council Chair Furfaro: One hundred forty foot (140') lot will now only have thirty-one feet (31') of building space building envelope and it will still cover the required setback from the road and from the side so it could be a twenty-six foot (26') building envelope.

Ms. Pap: That is assuming you have a lot that is eroding at point seven feet (0.7') per year. Each one is going to be different.

Council Chair Furfaro: Based on the example you gave us and these rates this lot will basically at about twenty-six feet (26') of building envelope.

Ms. Pap: Yes. So I want to break apart that formula even more for you. I have the formula repeated again up here at the top of the slide. So the forty feet (40'), what is that based on? This comes straight out of the *Hawai'i Coastal Hazard Mitigation Guidebook* which was a guidebook that was put out by Sea Grant and others; by Dennis Wong. And the forty feet (40') was basically based on two (2) things; a design buffer of twenty feet (20') to account for the fact that when a structure is within twenty feet (20') from the shoreline it is pretty much in trouble. They are going to be coming in and asking for shoreline protection or other kind of mitigation. Twenty feet (20') plus another twenty feet (20') for short term storm erosion events, that gives you forty feet (40'). That is a bare minimum and that is for big events like happened on the north shore of 'Oahu this year. So that is your bare minimum of forty feet (40').

Next you have the seventy (70) years. This is your multiplier. This is based on the average life of a wood frame coastal structure which is published in the literature, seventy (70) years.

Now we have this additional twenty feet (20') and this is something that is new. The other parts of the formula already exist in the law. This is an additional twenty feet (20') now that the group has come up with and it is an additional buffer to account for uncertainty related to sea level rise which is likely to increase erosion rates and wave inundation risk. This is a map of Hanalei that was produced by a group of us at Sea Grant for a technical study for the Planning Department. This shows potential inundation with three feet (3') of sea level rise. Expected future increases in sea level will result in increases to historical erosion rates and will add pressure to already eroding beaches and beaches that may be previously stable. The erosion rate maps that I showed you before, again they are historical erosion only. So they are not accounting for future, potential for future accelerated sea level rise. That is what we are talking about now. There is no standardized method yet for predicting future shoreline erosion due to sea level rise for Hawai'i. There are many different models that have been produced over the years but Dr. Chip Fletcher is trying to refine those models and they are working on this through extensive research currently. These research results are forthcoming so adding a defined buffer of twenty feet (20') is just a proactive method to account for sea level rise and other uncertainty while more information is being generated.

Council Chair Furfaro: If I may.

Committee Chair Bynum: Yes.

Council Chair Furfaro: Everything that you showed us earlier with the formulas we have, for some of us that...we put that in our existing law. The real difference here in our current law is this additional twenty foot (20') buffer which is really focused on unknown sea level rises.

Ms. Pap: Correct.

Council Chair Furfaro: Unknown for Hawai'i and we are...

Ms. Pap: Correct.

Council Chair Furfaro: Do we have any idea of what, I mean, being that we are twenty-five hundred (2,500) miles from any land mass.

Ms. Pap: Well what the rule of thumb for global estimates and for Hawai'i is currently at least one foot (1') by 2050, three feet (3') by

2100 but we are still using global estimates. So that is what we are trying to refine now is to get localized.

Council Chair Furfaro: I understand that but I hope you understand my point, we are twenty-five hundred (2,500) miles away from any real land mass the change here is the additional twenty feet (20') to make up for the sea level rise from what our existing law is.

Ms. Pap: That is the main difference. Yes.

Council Chair Furfaro: That is the main difference.

Ms. Pap: There are also some other differences that I have some slides later on that I can show with the multipliers. The current law actually has a different multiplier for structures that are greater than five thousand (5,000) square feet and that (inaudible).

Council Chair Furfaro: It is hard to get five thousand square feet (5,000ft<sup>2</sup>) inside of twenty-six feet (26'). Got it. Thank you.

Ms. Pap: There are several small lots that were subdivided before we had all of this information we have today about hazards and those will be an issue...

Council Chair Furfaro: The information that we have today, the extra twenty feet (20'), is really still a guestimate. Dr. Fletcher does not have anything concrete for us to say that is the right formula. That is the only point I am trying to make. The difference in the current law and this is the additional twenty feet (20').

Ms. Pap: The difference in the current law and this is the additional twenty feet (20') on that formula. Yes. Where was I?

Committee Chair Bynum: Are you ready to proceed? Councilmember Yukimura.

Councilmember Yukimura: So you just completed explaining the first shoreline setback process for small lots, right?

Ms. Pap: For all lots that are subject to the study. They are all subject to it but especially small lots because the ones that are...Chair Furfaro is correct, the ones that are up to one hundred forty feet (140') are subject to that formula only. The rest of them are subject to both formulas. So I am just going through both of the formulas right now.

Councilmember Yukimura: I see. Thank you.

Ms. Pap: So this just illustrates the concept here. On the left we have a sufficient setback. On the right is a non sufficient setback that is just based on forty feet (40') which basically gives you maybe forty (40) years of protection, maybe not but it is a flat rate there. Using the erosion rate setback should ensure generations worth of protection. This would be your one hundred nine feet (109') here. Again, a generation's worth is bases on a seventy (70) year structure life. We are just revisiting where we are on the same chart. I am going to keep putting it in there so we remind ourselves. So we just went over the erosion rate formula which is contained in all lots, okay? So it is the greater of the two (2) so now for lots that are greater, that are larger we have this average lot depth formula as well which is here and then here. The one hundred feet (100') from the shoreline is actually part of that formula. It is the cap of that formula. The lot depth calculation is based on a principle that because of the multiple hazards involved on the coastline. If your lot is large enough then it would be prudent to setback as far as possible and is reasonable based on property rights. Even if the erosion rate data yields a smaller setback. So you take the greater of the two (2). So for those larger lots the lot depth formula is essentially used as a minimum and it is capped at one hundred feet (100') so you are not required to go above that as shown for those lots that have an average lot depth of greater than two hundred twenty (220).

Committee Chair Bynum: Ruby, now I have a question. The maximum setback regardless of formula is one hundred feet (100')?

Ms. Pap: No. It is just capped. It is still the greater of. I am going to go through an example.

Committee Chair Bynum: Okay.

Ms. Pap: Still the greater of the two (2) but let us just say your one hundred foot (100') is the greater of the two (2) of the erosion rate formula and the one hundred feet (100'). Your formula would not require you to setback...let us say you have a five hundred foot (500') lot. It would not require you to setback more than one hundred feet (100') if the erosion rate is small.

Committee Chair Bynum: I see and if the erosion rate...

Ms. Pap: I am going through an example now.

Committee Chair Bynum: Okay, go ahead. Thank you.

Ms. Pap: It is a little hard to conceptualize that. So, breaking this up a little bit here. What is this based on? Basically it is a mathematical...and just again I...so you know what we are looking at here. This is the formula again repeated up here. For lots for one hundred forty to two hundred twenty feet (140' – 220'), the formula is you take your average lot depth, you subtract one hundred (100), divide by two (2) and add forty (40). For lots greater than two hundred twenty feet (220') your setback is one hundred feet (100'). That is just on the average lot depth formula. It is simply a mathematical algorithm using two (2) predetermined end points. There was a policy decision to have a minimum of sixty feet (60') for most lots and a maximum of one hundred (100). The formula simply divides this up equitably based on lot depth size. The minimum of sixty (60) is the minimum setback you would get with a zero (0) erosion rate but often it makes sense to move back further based on multiple hazards if the lot is large enough and this is reasonable. The maximum of one hundred (100) was a decision made on what is reasonable on a large lot, absent information on higher erosion rates. So if you had a higher erosion rate that would bring you further than one hundred (100) then you would be setback at that point. Always remember it is the greater of the erosion rate formula or the average lot depth formula for lots that are subject to the Kaua'i Coastal Erosion Study. So what it does is allows for a logical setback based on lot depth. It is relaxed for smaller lots, for property rights purposes. So the setback is smaller if the lot is smaller. Increases for large lots where there is ample space to prevent hugging the volatile coastal hazard zone and again it is capped at one hundred feet (100'). So I am going to go into an example now because I know this is where it gets complex. Again just revisiting where it is at in the law...let us see if I have anything else I wanted to say about it. So taking an example...no, it is the greater...again, it is the greater of the erosion rate formula or the average lot depth formula. So take an example of a two hundred foot (200') average lot depth, four thousand square foot (4,000 ft<sup>2</sup>) house. The erosion rate is point seven feet (0.7') per year. The erosion setback is forty plus seventy times point seven plus twenty you get one hundred nine feet ( $40 + 70 \times 0.7 + 20 = 109$ '). For your average lot depth setback, you would take your average lot depth which is two hundred subtract one hundred divide by two add forty you get ninety ( $200 - 100 \div 2 + 40 = 90$ ). In this case and in many cases, your erosion rate is going to be the deciding factor. That is your setback. The key here is the average lot depth provides a solid minimum if your erosion rate data is not necessarily reflecting a highly seasonally dynamic coastline and I am going to go into an example here because you are like use...why even use this average lot depth formula on lots that have erosion rate data? Remember this erosion rate data is averaged over a century so it is a long-term erosion rate but the average lot depth balances this risk of uncertainty from short-term erosion, wave inundation, and flooding with the property rights of the owner because remember the setback increases for larger lots, decreases for smaller. It is well suited, the average lot depth formula is mostly well suited for shorelines that have short-term seasonal episodic erosion that is not necessarily captured in the long-term rates in that study. I am going to provide just



one (1) example of this. Take Hanalei Bay again since we were looking at that earlier. As you can see from this map, so this is a typical, this is the erosion rate map for Hanalei Bay. Most of the bay over the last century has been considered accreting, that is these blue lines here versus red. That means the historical data over one hundred (100) years actually shows that this beach has been growing. But let us zoom in on this side here. So again these are your average erosion rates over the century. About a half a foot to point seven feet (0.5' to 0.7') to much smaller accretion there but note the shorelines. These are the shorelines that the rates were based on. You can see that this is a highly dynamic coastline. So although it has been growing over time you have these short term seasonal events and sometimes it takes just one (1) to threaten a structure, one (1) high swell, one (1) big winter storm. So coming back to this average lot depth formula for these lots it is the greater of the two (2); the erosion rate formula and the average lot depth formula. So take a Hanalei Bay example. What we saw was that the erosion rate is actually a positive, so it is accreting. It is accreting at approximately; I just took a rough average of point three feet (0.3') a year. When you do these calculations because it is not eroding, right, it is growing. You assign that as zero (0) value. So what you would get would be seventy times zero which is zero plus forty plus twenty you would get a sixty foot ( $70 \times 0 = 0 + 40 + 20 = 60'$ ) setback. This may not be enough to protect a structure that is based on seasonal...that is being subject to seasonal episodic dynamics. So this is where your average lot depth really saves you because we know this lot is...lots are roughly...I did a very rough measurement. They are about two hundred eighty feet (280') deep on that side. As we saw here for those lot that are greater than two hundred twenty (220) they have a one hundred foot (100') setback. So you take the greater of those two (2) formulas, right? So you would get one hundred feet (100') because the lot is actually large enough to do so, there is space to setback further the structure is protected from these episodic dynamics. And just as an example from January of this year. This is after we had really high swells. This is the debris line. This was taken from shoreline specialist at Department of Land and Natural Resources (DLNR) also with Sea Grant. This is the debris line, how far those waves came up on these lots. And this just shows, just generally for illustration purposes only what that setback would be. So here would be the sixty foot (60') setback under the erosion rate formula because it is based on a long term rate and this would be the average lot depth setback at one hundred (100). So you can see that many of those houses are already setback pretty far and there is space to do so. So that is the philosophy behind that.

Committee Chair Bynum: Could you yield for a question from Councilmember Hooser, please?

Ms. Pap: Yes.

Councilmember Hooser: Just a quick question and I apologize if you already addressed this issue. I find myself looking at your aerial photos measuring

the erosion rates and I understand that, and then I look at the high wash of the waves...are we talking about two (2) different shorelines? Because the high wash of the waves would be the...

Ms. Pap: I am not talking about the location of the shoreline right now and that is determined by the State. So what I was showing with that illustration was just how dynamic that coastline is and how far the waves can come in. But on the erosion rate maps, they are not indicating the shoreline, but just indicating the long-term erosion rate.

Councilmember Hooser: Okay. And so the erosion map shows and accretion but does that correspond with a decrease of the shoreline?

Ms. Pap: No, not necessarily.

Councilmember Hooser: So the high wash of the waves...

Ms. Pap: It is depending on different criteria.

Councilmember Hooser: Right.

Ms. Pap: And we actually have the specialist here.

Councilmember Hooser: So the sand may be increasing but the high wash of the waves remain the same or could be increasing the other way?

Ms. Pap: Yes. It changes over time and...yes.

Councilmember Hooser: Okay, that was my question.

Ms. Pap: I also mentioned earlier that we have two (2) types of lots. We also have lots that also do not have any erosion rate data. How do we handle those? This is found, and I am hoping this is the same language still because I just got the latest amendment. This is section "D"...on page 4 of the amendment at the bottom. It looks to be the same, good. We are all on the same page. Basically what you would do for these ones, you would still have protection from hazards on these lots that do not have any erosion rate data but may have hazard implications and it would be based on the lot depth formula. For lots, now this is something the group came up with, with some bare minimums...you would still do the average lot depth formula where your setback would grow for larger lots and be smaller for smaller lots but you would have these bare minimums based on whether or not you are located on a rocky shoreline, which is considered to be less...very little erosion at all, if any and for all other lots that are not in the study but may have more erodible material would be a minimum of sixty feet (60'). Then

again in the same concept along the same vein of the other lots having a cap of one hundred feet (100') on that setback. Most of this is no different from current law but the minimums actually are something that are specified a little bit differently now here.

Committee Chair Bynum: Ruby.

Ms. Pap: Yes.

Committee Chair Bynum: Point of clarification from Councilmember Yukimura.

Councilmember Yukimura: I just want to...since rocky shoreline is being referred to. Just to point out that there is this definition of rocky shorelines. It is in the...

Ms. Pap: Here you go.

Councilmember Yukimura: Okay, good.

Ms. Pap: It is also in the Bill.

Councilmember Yukimura: It is actually in the current law but it has been amended to be stronger and clearer, I think.

Ms. Pap: Oh really. Okay. Good. Is it in this draft?

Councilmember Yukimura: No actually it is the same. So it is what is in the current law and if anyone wants an explanation of that we could ask Chris to come up but anyway there is a definition of rocky shoreline.

Ms. Pap: Yes so let us just read...so let us get into that. Rocky shoreline means the shoreline segment acting as the primary interface between marine dominated processes and terrestrial dominated processes, so that is the shoreline are that is composed of hard, non-dynamic, non-erodible materials such as basalt, fossil limestone, beach rock, or other natural non-dynamic material, not to include those things like cobble or gravel beaches that are dynamic, that move, or erodible cliffed shorelines composed dominantly of dirt or clay. I am going to provide some examples if Chris could come up and talk about that a little bit too, Chris Conger. But I want to just first provide an example of how this plays out on a setback. Here is just an example of an area that is not subject to the erosion study, so we have to figure out what the setback is. Just for illustration purposes only I cannot really tell you where this is but the black line is the lot outline here. You have a four hundred six foot (406') average lot depth. One hundred foot (100')

setback would be required and again here is the formula, average lot depth minus one hundred (100) divided by two (2) plus forty (40). I forgot to put in there that for lots that are greater than two hundred twenty feet (220'), it is just a flat one hundred feet (100'). Sorry about that. It would be a one hundred foot (100') setback required so this kind of shows that here and then let us just say that the minimums are not coming into play because we have a really large lot so you are going to setback one hundred feet (100') regardless. But let us say you have a really small lot in this area, so this is where if you could not make that one hundred feet (100') according to the formula or you took your average lot depth for a smaller lot less than probably one hundred forty feet (140'), this would come into play. You would start to get much smaller and smaller setbacks as you apply this formula and so you want to make minimums in there because if you got a really small lot you do not want to go below forty (40) for a rocky shoreline or sixty (60) for a non-rocky shoreline. We have increased it to sixty (60) for those areas that could be dynamic because they are not...they may not have erosion rate data and they may not be totally be rocky but they may still be erodible, right? So that illustrating that there. I hope that makes sense.

Committee Chair Bynum: Can you contrast this with what the existing law says?

Ms. Pap: Yes. In fact let me try and get to that. For the current Ordinance as I understand it, and Planning Department, you can correct me if I am wrong, it is not specifically stated but the average lot depth formula is typically used. For the current and for the proposed amendment same thing it is used but there is this language of minimums and maximum.

Committee Chair Bynum: In the instances of a rocky shoreline this could move a structure closer to a bluff than currently is allowed?

Ms. Pap: No. I do not think so. So let us just take an example. Small, non-rocky lot not included in the study. It is one hundred twenty feet (120') here. Under the current law, you would have an average lot depth...the average lot depth formula in the current law is slightly different. It is here. So I am just repeating that. It is a slightly different average lot depth formula and that was changed to address some large jumps that they had in the setback. This was a smoother formula.

Committee Chair Bynum: That went too quick, I could not digest that.

Ms. Pap: I know and it is out of order in the presentation so...

Committee Chair Bynum: Maybe I should just wait then.

Ms. Pap: Do you want to do that or...

Committee Chair Bynum: Yes, I will let you proceed but this is a key question for me.

Ms. Pap: Yes, I think maybe it would be good to just go over all of the differences at once after we have talked about rocky and non-rocky.

Committee Chair Bynum: I want us to be expeditious as possible so let me allow you to continue but I am going to return to this question because I saw a disagreement in the new...

Councilmember Yukimura: So when we come to that maybe we can get Caren to also input but let us go through.

Ms. Pap: Yes, okay. Thank you. I appreciate that. We had just gone over the example of what is current proposed in the amendments on how to handle setbacks on lots that are not subject to the study and lots that are not already exempt. I want to point that out. These are lots that are subject to the shoreline setback.

Committee Chair Bynum: Maybe I can make it specific to this. This minimum, under the new law with a four hundred six feet (406') lot depth, under the old law, what would that setback be?

Ms. Pap: Under the old law on four hundred six feet (406'), it would be one hundred feet (100').

Committee Chair Bynum: Okay, thank you.

Ms. Pap: And I will show you that. It is a little bit out of order according to your thought process but it will make sense hopefully in a minute. I want to just go over the differences in the rocky versus non-rocky and Chris, I do not know if you want to add anything since these were you slides and then I will come back up.

CHRIS CONGER, Coastal Scientist at Sea Engineering, Inc.: *Aloha.*

Committee Chair Bynum: *Aloha.*

Mr. Conger: Thank you, Chair and Councilmember. My name is Chris Conger and I am a Coastal Geologist with Sea Engineering. I have

assisted the working group and I have worked with Ruby in preparing the slides for rocky shoreline.

Committee Chair Bynum: Thank you. Welcome.

Mr. Conger: Thank you. For rocky shoreline we were looking at a way to define those areas that are non-erodible. As you know the shoreline setback is promulgated to protect housing, development, people from coastal hazards. The preeminent coastal hazard that we usually design for is coastal erosion and then of course we have flooding and wave impacts. For those rocky shorelines, those are areas that we have identified that are basically free of erosion. They are hard, non-dynamic, non-erodible material and that is the key. Now the minimums only really come into play when we are talking about small lots, not larger lots. The larger lots will also be using the average lot depth calculation and will be given anything from forty to one hundred feet (40' - 100'). So it is only the smallest lots that are rocky shorelines where this minimum comes into play; the difference between forty (40) and sixty (60). The forty foot (40') still gives us our twenty foot (20') buffer plus an additional twenty feet (20') for flooding and waves. As I have said rocky shoreline looks to identify those areas that do not have an erosion problem to begin with. The two (2) key phrases for rocky shoreline, and I would like to point this out, the definition is long and it has a great deal of explanation but really the key is where it is located. It is located at the interface between the marine and the terrestrial ecosystems. This is typically the same place that is identified for the shoreline certification purpose which is used for the standard shoreline setback determination. It identifies what? The "what" is hard, non-dynamic, non-erodible material. The rest of the definition goes into explanation for different examples of these and what may or may not qualify but this is the key. It is hard, it is non-dynamic, and it is non-erodible. Non-erodible, I think is one of the key features that we are interested in. What I have done is put together some slides which show examples. Here is Kalihiwai and if you notice on the point this is a basalt headland. It is very stable in nature, non-erodible for the duration that we are interested in for initial development. This is something in my mind would clearly qualify as a rocky shoreline that is hard, non-dynamic, and non-erodible. So we look to the other side of the bay, you can see maybe a more nuanced example. Here is a low rocky shelf with some boulders on it but on the *mauka* side of the shelf typically where we would see this interface between the marine and terrestrial...so the waves wash across this shelf, across the boulders, across whatever remnant sand is left on it and they come into contact with short bluffs. These are rocky, basalt, non-erodible bluffs that form a very stable feature along this coastline. For here even though the low line rocky coast is washed over where we come to that interface; the marine and terrestrial interface, we have this fifteen to twenty foot (15' - 20') rocky bluff that is non-erodible, non-dynamic, hard and that would be our key feature. A little more nuance than that, it is not quite as straight forward as

the cliff face but still I think a great example of what could be considered a rocky shoreline.

Equally important are those things that do not qualify. If you look at the second half of the definition it talks about what is not included in the definition of rocky shoreline. Again, we are looking at that interface between marine and terrestrial. Here we have a great indicator. We have a bunch of marine debris that has washed up at the top of our boulder beach, at the base of the vegetation and the clay slope. The definition clearly calls out that it is not to include cobbler or gravel beaches and for the simple reason that they are dynamic in their nature. They are beach, they are constantly adjusting even though it is a larger events and higher energy they are constantly adjusting to the native conditions and so I think it is a great example of what should not be looked to. Yes?

Councilmember Yukimura: May I?

Committee Chair Bynum: Yes, please.

Councilmember Yukimura: So basically this is not a rocky shoreline. The label should be "not a rocky shoreline."

Mr. Conger: This is not a rocky shoreline. Right so here if we look at the second blurb, not to include cobble or gravel beaches I think this is a great example of, yes, we could call that not rocky shoreline. That is a great point.

Councilmember Yukimura: Okay, thank you.

Mr. Conger: What should not be included? Those things which are dynamic and cobble and gravel beaches are a great example of dynamic coastlines even though they are much larger grain size. Here is another "not to include." A rocky shoreline, again the interface we are not looking at the low lie basalt bench that you can see being actively being over washed but if you look on the inside of that this is kind of Kīlauea, Larsen's area, you can see a boulder and sand beach at the base of a clay bank. It is a little bit dark in this picture but again this is a dynamic area. The bank itself is dominantly dirt or clay and this is also called out. It is an erodible cliff shoreline composed dominantly of dirt or clay or extensively weathered lava rock and so here is another case where though the water actually washes across rock we would not call it a rocky shoreline. It is just too dynamic. Again, not, yes. Not rocky shoreline. And I think this is probably one of the best examples for where confusion may lay as you look at coastlines with different types of material. This is Hā'ena and we are looking at fossil limestone with some basalt blocks but backed by a sandy beach on the *mauka* side and though there is rocky along the coastline, it is certainly not a rocky shoreline. The last example that I would like to point out of what is not a rocky shoreline it is also

specifically calls out that it must be composed of natural, non-dynamic material and so this automatically excludes any manmade structures. So though this seawall down by Spouting Horn does in effect limit the shoreline and define the shoreline on this coast it would not qualify as a rocky shoreline because it is not natural.

Councilmember Yukimura: I have a question.

Committee Chair Bynum: Councilmember Yukimura.

Councilmember Yukimura: So just to go back to your first slide on Kalihiwai, which Ruby brought up, that one. So actually where the *kamani* tree is, I mean it might be rocky out at the point but as it comes into that arena I am presuming that would be non-rocky as well.

Mr. Conger: Right. So in here and I will just give you an anecdotal explanation of what it is. We went out to that site as part of our tour with Councilmember Chock and Councilmember Yukimura. This is a sand beach on the *makai* side it transitions to a clay bank and boulder...this is all boulder beach, this is clay bank and boulder underneath the *kamani* tree and then behind that is another clay bank. So this entire area along this coastline though the waves wash across the sand beach, when they wash across the sand beach, they come to a clay bank and none of that would fall under the definition. This would all be clay, soil, or dynamic substrate. Even though it is at the base of a rocky slope, again it is the location, the interface between the marine and the terrestrial where those waves stop.

Councilmember Yukimura: Thank you.

Council Chair Furfaro: Can I say something?

Committee Chair Bynum: Yes. Council Chair Furfaro.

Council Chair Furfaro: Just so you know that point that you just showed us, the name of that place there is Kaiapo and it references the water that snatches because it is referencing that cove being susceptible to tsunamis and I just thought since we were looking it I would share place names with you.

Committee Chair Bynum: Thank you.

Council Chair Furfaro: Kaiapo.

Ms. Pap: This was originally going to conclude my presentation and then I have more slides that show the differences because I was anticipating those question coming up so I could just launch right in to those.



Committee Chair Bynum: Please launch.

Ms. Pap: With the erosion rate formula, so the difference between and I think there is a...you have a very extensive chart in front of you as well that compares...I think Aida and Peter put that together that compares existing law and current but I just kind of focused on comparing between the current Ordinance in place now and the proposed Bill. Here is the erosion rate formula under the current Ordinance and as I mentioned before it is for structures that are less than or equal to five thousand square feet (5,000 ft<sup>2</sup>). It is forty feet plus seventy (40' + 70) times the annual coastal erosion rate. The main difference is you do not have that additional twenty (20) but for structures that are greater than five thousand square feet (5,000 ft<sup>2</sup>) it is actually forty feet plus one hundred (40' + 100) times the annual coastal erosion rate and that is based on data in the literature that says for larger homes that are typically made of concrete masonry they are expected to last one hundred (100) years. Now seventy (70) years is certainly adequate the main difference here is for those structures that are greater than five thousand square feet (5,000 ft<sup>2</sup>) and that the setback might be a little less but there would be an added extra twenty feet (20') to account for future sea level rise and other uncertainties so it might make up for the difference in some cases but in these cases the main difference here for the smaller structures is that additional twenty (20).

Councilmember Yukimura: So, may I?

Committee Chair Bynum: Yes. Councilmember Yukimura.

Councilmember Yukimura: I just want to explain to everyone the context for this law which was passed about four (4) years ago. We did not have coastal erosion data and so anyone making application had to do their own coastal erosion study which was a considerable expenditure but if they wanted to go through with that they could and in lieu of that we had this sort of ridged schedule that if it was one hundred (100) to two hundred (200), we saw the chart that went in intervals so if they did not want to do their coastal erosion study then they could just go by this rather arbitrary system or take whichever was larger.

Ms. Pap: Right.

Councilmember Yukimura: I just want you to know this was done in a time where we had no coastal erosion data done by an independent study in a comprehensive way that Dr. Fletcher has done it. We were sort of working in a vacuum and but we thought it was important to put something in place while the study was being done. So just so you know that now with that we have the data we are basing it on the data where there is data but there are still places where there are not data and that is what we are doing.

Ms. Pap: Correct. We still have the average lot depth formula today as well which it is very similar to the original average lot depth formula but the proposed formula which is down here...so here is the original, I will just go through it. It had these...from one hundred feet (100') or less to more than two hundred feet (200') and it basically went up by twenty foot (20') increments. The proposed formula which is down here, the average lot depth minus one hundred (100) divided by two (2) plus forty (40) are for lots that are greater than one hundred forty feet (140'). It addresses these ten foot (10') jumps in the setback that occur in the current Ordinance. If you were to apply this...so it addresses some equity issues. So if you see the calculation for one hundred sixty (160) and one hundred sixty-one (161), under current law, one hundred sixty feet would have a seventy foot (70') setback and one hundred sixty-one feet (161') would have an eighty foot (80') setback. So that is a ten foot (10') difference for only a lot that is a foot difference in size. There are some issues with the mathematics here. This formula actually smoothes that out so under current law...sorry, under the proposed formula one hundred sixty foot (160') lot would have a seventy foot (70') setback if you did the math and one that was one hundred sixty-one (161) would have a seventy and a half foot (70.5') setback, so it smoothes that out so the equity issues are addressed there. Also, under the current proposal, there would be no average lot depth formula for lots that are one hundred forty feet (140') or less and that is mainly because the smaller lots are going to be in a difficult situation to begin with and we wanted to have a sixty foot (60') minimum on the rest of the lots but that these ones were going to have to be...it was going to work out to be the same, basically. In a lot of cases they would be pushed into a variance situation where that setback would probably have to be adjusted or the size of the house would have to be adjusted, et cetera, et cetera. Here is an example. Take a four thousand square foot (4,000 ft<sup>2</sup>) house with an erosion rate of point seven feet (0.7') per year, your erosion rate...so right here we have the existing Ordinance and the proposed Ordinance. Currently it would be forty (40) plus seventy (70) times the erosion rate and you would take the greater of that or the average lot depth which is between one hundred eighty-one (181) and two hundred (200) which was ninety (90) which can be found in this chart here. What you come up with is a ninety foot (90') average lot depth setback and an eighty-nine foot (89') erosion rate setback. Under the current law it would be ninety feet (90') existing. Proposed law, you take the greater of the two (2) as well. Erosion rate setback forty (40) plus seventy (70) times point seven (0.7) then you add that twenty feet (20'), it is that same example you get one hundred nine foot (109') setback. The average lot depth setback you take the...sorry this is a two hundred foot (200') deep lot, two hundred minus one hundred divided by two, plus forty equals ninety feet ( $200 - 100 \div 2 + 40 = 90$ ). Take the greater of the two (2), you have a one hundred nine foot (109') setback. Just one (1) example of a lot that has an erosion rate of point seven feet (0.7') per year and is two hundred feet (200') deep and this is the difference here. So how about those not included in the study? I think I showed this before, under the current Ordinance typically that average lot depth formula is used although it is not

actually specifically stated but my understanding is that is the practice and the proposed amendments you would have the average lot. You would still use the average lot depth formula but that new formula which we have been talking about with those minimums of forty or sixty (40 or 60) depending on whether they are rocky or non-rocky and a maximum of one hundred (100). The main difference is that on non-rocky shorelines, the ones that might still be a little erodible, you may have a twenty foot (20') larger setback than currently required for smaller lots if the minimums come into play, right, because you would have a sixty foot (60') minimum versus a forty (40) which would be required, forty to fifty (40 – 50) under the current lot depth formula. I just want to be clear that I am only going over these examples that are subject to the Ordinance. I know there is probably going to be discussion about exemptions and applicability and rocky versus non-rocky in that context, but I am really just going over the setback calculations at this point.

Committee Chair Bynum: Understood.

Ms. Pap: Okay. Here is an example, lot not included in the Kaua'i Coastal Erosion Study. Existing Ordinance here and proposed here. You go to your average lot depth formula, under the current Ordinance anything that is, and actually it is the same size lot; two hundred feet (200'). Anything that is one hundred eighty-one to two hundred feet (181' – 200'), would have a ninety foot (90') setback; existing. Current law same setback. It works out to be the same, ninety feet (90'), two hundred minus one hundred divided by two plus forty you get ninety ( $200 - 100 \div 2 + 40 = 90$ ). So in many cases it is going to be very similar setback. But on a small, not rocky lot, not included in the Kaua'i Coastal Erosion Study, I know that is a lot, so it is a small lot, it is not rocky, but it is still not included in the study because it is not a sandy shoreline, you would have...let us say it is one hundred twenty foot (120') deep, the average lot depth under the existing Ordinance and setback would be fifty (50). Under the proposed it would be a minimum of sixty feet (60') because the average lot depth is one hundred twenty minus one hundred divided by two plus forty is fifty ( $120 - 100 \div 2 + 40 = 50$ ). I erroneously included...I do think the erosion rate would apply because there is not erosion rate. Sorry that should not be there. It would be the average lot depth...so you would come out with fifty feet (50') but remember because it is not rocky you would have to jump up to sixty (60) because that would be your minimum so you would have a slightly larger setback under the proposal for that case. Does that make sense? And that is all and I can go back to my contact information for questions or take them now.

Committee Chair Bynum: Do we have questions for Ruby from Councilmembers? Wow, you must have done a great job.

Councilmember Yukimura: Can I continue?

Committee Chair Bynum: Please do.

Councilmember Yukimura: Thank you very much, Ruby, and if other questions occur to you, I am sure we will have more chance to ask Ruby. If we continue on the Floor Amendment, Ruby has explained this section regarding shoreline determination. If we move on. There is no major change except on page 8. The first change on page 8, I believe is in (C). It is just using the proper terminology. The second change, number 12 on page 8. Let me just be clear that these are under the section called "permitted structures within the shoreline setback area. These are things that are allowed in the shoreline setback area." They follow what the statute, I believe, defines as allowable and number 12 on page 8 says that "structures built to address an emergency as declared by Governor of Hawai'i and Mayor of the County or any public official authorized by law to declare an emergency." Those are structures that are permitted in the shoreline setback area. We clarified that it has to be structures built by a government agency since there were; during 'Iniki and Iwa, structures built by private groups or people and that is not what is permitted or should be permitted. Then on page 9, this is an addition. "Structures required for remedial and removal actions undertaken pursuant to Chapter 128D of Hawai'i Revised Statute (HRS)." I believe and working group correct me if I am wrong, these are pollution remediation efforts and that is language from Chapter 128D so it is in the State statute as well.

Committee Chair Bynum: Councilmember Yukimura, on page 8 number 8, is the words "or activity" removed?

Councilmember Yukimura: Yes.

Committee Chair Bynum: Is that not significant?

Councilmember Yukimura: Yes. Thank you. It is the overall decision that we are making to exclude activities from this Bill because activities are movable, they are not structures and we believe the intension of the Shoreline Setback Law was the siting of structures. Whether it is houses or other structures that could be affected by coastal erosion or wave action and hazards and as we suggested, the activities would be better governed by Special Management Area (SMA) law. Whether it is weddings or commercial activities or whatever they are better governed by an SMA law which is not about coastal erosion but about shoreline in general and that is the...there was a question regarding that about whether it is legal to do that and that has been addressed by a County Attorney's opinion and that is the opinion that we want to make public so that everyone can take a look at.

Committee Chair Bynum: Okay, but that is a very significant change from existing law.

Councilmember Yukimura: Thank you. It is.

Committee Chair Bynum: Can I ask just one (1) follow-up question right now? I just asked to see the purpose section in the original law and was told that there was not one and was there any discussion about the purpose section in this draft because to me it is incomplete.

Councilmember Yukimura: There is a purpose section that actually incorporated the purposes of the original act. That was an amendment that we made in Draft 1.

Committee Chair Bynum: The current draft...

Councilmember Yukimura: There should be a purpose in Draft 1.

Committee Chair Bynum: There is a new purpose section?

Councilmember Yukimura: Yes and you will see it on page 2 of this large document, all of the underlined portions is the purpose section.

Committee Chair Bynum: My goodness.

Councilmember Yukimura: There was not a real significant...well there was a significant purpose section in the original Bill, I believe, but we amplified it as I recall. Maybe that is an omission in this framework.

Committee Chair Bynum: Well I was looking at this document at section 2 where there is a paragraph that is labeled purpose.

Councilmember Yukimura: Which document are you referring to?

Committee Chair Bynum: This one. Section 2, Chapter 8, Article 27, Section 8-27 purpose.

Councilmember Yukimura: What page? Aida is explaining to me that the current law per our normal procedures we do not public the purpose statement in an Ordinance when we codify the law. Right? And that is why it is not in the existing law but we did per Caren Diamond's request include a purpose in Draft 1.

Committee Chair Bynum: Now I am totally confused. In the original law was there a purpose section.

Councilmember Yukimura: In the original Ordinance that was introduced and passed, there was a purpose section, but when it is codified, that purpose section is not printed.

Committee Chair Bynum: So we could find what the purpose section was in the Ordinance?

Councilmember Yukimura: We could from Ordinance 860, I believe.

Committee Chair Bynum: So I would like to make that request because I am...maybe I am confusing things but I looked at this purpose section that is in this document on Section 8-27. I did not look at all of this other underlined stuff. Which one is the purpose? Section 1 or section 2?

Ms. Pap: If you look at... if I may, I am sorry.

Council Chair Furfaro: Excuse me, you have to be identified by the Chair. She wants to respond.

Committee Chair Bynum: Please.

Council Chair Furfaro: But we cannot have two (2) Councilmembers talking and you talking.

Committee Chair Bynum: The rules are still suspended. So I am just looking at this. I thought the purpose section was this one (1) paragraph but it is all of this other stuff? Why is it in two (2) places? I am confused.

Councilmember Yukimura: Because we wanted to put in a clear purpose in the Ordinance which for purposes of historical interpretation and so forth is still part of the public record but we also wanted a purpose section in the codified process that gets put into the County Code. So we have a lengthy purpose statement as is often the case with Ordinances or Bills and we have a shorter purpose statement that will be part of the codified law so that we have covered both bases.

Committee Chair Bynum: So let me tell you where I am going with this. I have see a lot of discussion in that purpose that is codified that talks about protecting life and property in longevity and integrity close to resources but this to me is a shoreline setback bill. It has other purposes other than coastal protection and protection of structures. It has setbacks that impact view plains and esthetics and other issues that to me, I was here when the original Bill passed. That was a big part of the Bill. It was not just a coastal hazard bill it was a shoreline setback

bill. Is that still honored in this draft? That is what I want to know on a big picture.

Councilmember Yukimura: I believe coastal views are covered under the SMA Law. I do not believe they are covered under shoreline setback and I have the original purpose statement if you want to look at it.

Committee Chair Bynum: I do and for me this Bill always was a Shoreline Setback Bill that primarily addressed coastal hazards and structures.

Councilmember Yukimura: That is right.

Committee Chair Bynum: But addressed other things too like activities and...

Councilmember Yukimura: No.

Committee Chair Bynum: The original did, in my mind and when I voted for it, the focus is coastal hazards but the Bill impacted coastal view plains and setbacks from rocky bluffs and had esthetic...you know addressed other community goals along the coastline and so if we...I just want to have that dialogue. If we are changing this to a strictly, technical hazard bill and we are no longer concerned about activities and view plains...those were part of my motivation for passing this Bill in the first place.

Councilmember Yukimura: Chair, I think if you look at the purpose statement of Ordinance No. 863, which is the original Ordinance; which is what Caren Diamond's requested, worked on, and introduced, you will see that it does not talk about view plains and that the actual...this is all part of the SMA...the HRS Chapter 205 which does talk about the coastal zone. It is a Coastal Zone Management (CZM) law so it talks about the entire coastal zone but in terms of regulating, I think we felt that the logical separation or division of regulation, one (1) happens through the shoreline setback and the other happens through the SMA permit and that is where we are trying to make the separation. If you look at all of the criteria for shoreline setback determination it is not about view plains. It is about coastal hazards and coastal erosion but you will have time to look at that. We all will have time to look at the history and at the proposed division in regulation to see what is the best way to address both concerns. It is not that view plains and other coastal zone issues will not be addressed. It is just which are the proper regulatory framework for addressing it and I believe Planning Department has some...

Committee Chair Bynum: And I will recognize Ka'aina in a minute. I just want to follow-up. What you just described, I understand it, but is that the consensus of the entire group?

Councilmember Yukimura: There is not a consensus about activities.

Committee Chair Bynum: And so will you acknowledge regardless of what the purpose said in 1987...I mean I am sorry, whenever we did this like four (4) or five (5) years ago.

Councilmember Yukimura: 2007.

Committee Chair Bynum: So whatever the purpose said in 2007, I was a new councilmember at the time. I worked really hard on this law and this law to me was a setback law that primarily dealt with structures and coast but also dealt with activities and things like view plain. Do you acknowledge that the law does, as currently written, does have impact on those issues whether it is in a statement of purpose in the original law or not?

Councilmember Yukimura: If you are asking whether the current law impacts activities I think we should talk to the Planning Department about how they have been handling it but there is no criteria in shoreline setback determination about how you are going to address activities, they move. Coastal erosion happens over a long period of time, and activities happen in an hour. You will see that the regulatory requirements do not make sense in terms of activities. They make much better sense under a SMA permit that the criteria for issuance of permits and so forth make much more sense under a SMA permit than under...but I think we really need to have Planning weigh in on this.

Committee Chair Bynum: I will do that but I think my question was the law is currently has had an impact on those issues, correct?

Councilmember Yukimura: I do not believe so.

Committee Chair Bynum: Okay. Ka'aina, you had something to share.

Mr. Hull: The request or essentially the recommendation to remove activities from the Ordinance is a request of the Planning Department as agreed to by the Planning Commission and that is because, with all due respect, activities is single handedly the biggest problem in the existing Ordinance for the department to enforce right now. The term "activities" in there, what the Council needs to keep in mind is the Shoreline Setback Ordinance operates within the context of Chapter 8 of the Kaua'i County Code which is the Comprehensive Zoning Ordinance which regulates under the



Planning Department both structures and uses. Setbacks are established for structures. Now when this came into play and said it shall be applied to both structures and activities, which the Department does regulate. It regulates all land used activities, be them commercial, be them residential, be them agricultural. By requiring that within the framework of the Shoreline Setback Ordinance, it essentially required us to make determinations as well as possibly require shoreline surveys for all activities. It was a *carte blanche* activities period. Meaning everything from commercial activities, such as wedding receptions, sale from food trucks as well as things like picnics, shoreline fishing, and going to the beach. These are all activities that occur on lands abutting shorelines. Technically under the law we are required to make a determination for a family *pā'ina* on a shoreline property because that term activities is used in there. If that is the intention of this Council to keep that there we will still stand by the fact that we cannot enforce that and we do not enforce that. It is not in our interest right now to go out and issue violation notices to guys fishing on shoreline properties so we looked at that as being as one of the biggest problems with the Ordinance right now and said okay, what type of activities within this framework, either affect coastal erosion processes or are affected by coastal erosion processes and we could not come up with anything. In essence there may be problems say with commercial wedding venues in shoreline properties, right? The use itself, the actually just the use, is now what is going to affect coastal erosion processes nor will coastal erosion processes affect that use. They will just move it a little bit further back. It might be the tent structure that will say affect the view plains or what not and should they want to put the tent structure in there immediately that structural proposal would trigger the Shoreline Setback Ordinance review of it and as far as the overall use of it, like Councilmember Yukimura is going into that would automatically be pushed within the SMA rules and regulation. If they are charging for it, it is more likely they will have to go through an SMA use permit and go before the Planning Commission. So there are ways to address it but as far as setback wise, the Department just found it is extremely problematic nor do we find activities or uses that are being affected or are affected upon the coastal erosion processes. If the Council should determine that there are specific uses that it feels are affecting coastal erosion processes or are affected by coastal erosion processes, the Department will be, I think, fine in having that specifically laid out but just that *carte blanche* term "activities" has proven extremely problematic for us.

Committee Chair Bynum: Thank you very much for that explanation and let me say I am asking questions, I am not taking a position. So one (1) follow-up question is why was activities in there in the first place? I mean were the people just misguided that wrote it in 1987 because those people, some of them are here at the table. I have not been in months and months of program meetings to discuss this, I just see what is in front of me and there is a new purpose section that was not there before, that does not say anything about some of the issues that were important to me when I originally voted for this Bill. That is the point I am

making. I think you know what my history is, I like pragmatic bills that are easy for you to implement as much as humanly possible so I just want to make clear that I am not taking a position but it is a really significant thing to remove activities based on all of our dialogue in 2007. Did you want to follow-up Mr. Dahilig? Then I will go to JoAnn.

MICHAEL A. DAHILIG, Director of Planning: Mike Dahilig for the record. If you look at the purpose section of the law especially...I guess I will just use this big sheet. This Shoreline Setback Ordinance is being proposed under authority of Chapter 205A as well. So this is a 464 type of law but it is also being proposed under the authority of Chapter 205A, which is the State's Comprehensive Coastal Management Law. If you look at Chapter 205A, there are three (3) parts to the law; part 1 lays out the purpose and the objectives of CZM. The second is the SMA Law which our department has regulatory authority over and if you look at its purpose it is really geared towards that activity enforcement type of mechanism and then if you look at part 3 it is specifically with respect to shoreline setbacks. So the law encompasses these two (2) different regulatory regimes to try to overlap each other and provide the best coverage possible and I think, and this is one (1) of my speculations, I cannot speak for the others that were around the table seven to eight (7 – 8) years ago but I think the lack of enforcement in the shoreline setback area, I think prompted a, essentially a reaction saying hey, we have to do something and so I think through no fault of anybody, I think everybody was concerned about the fact that houses were being put close to the shoreline, how do we react to this? How do we enforce it? And think it is only through the process that Ka'aina is describing of us actually implementing the law did we start to discover that we had these loopholes that were creating unnecessary regulatory work for our department and I think that is why you see a recommendation there to have the activity based violations be addressed through our SMA process. Which, I do not want to bring up the issue of fines too much but if you look at part 2 versus part 3 right now under the County Code I can only fine up to ten thousand dollars (\$10,000). If I go to SMA and I enforce something through SMA, I can enforce up to one hundred thousand dollars (\$100,000). So there is a lot of regulatory flexibility with respect to Chapter 205A part 2 that will capture a lot of the view plain and use concerns that I think the word activity points out.

Committee Chair Bynum: I think for the public it was important to clarify that this was a recommendation of the Department, where it came from, and what you are trying to address because the interplay of CZM and the County laws is something we discussed at length for many years. I know you have regulatory issues that we will discuss on other postings so thank you for that explanation. I am going to go to Councilmember Yukimura and then Ms. Diamond.

Councilmember Yukimura: I was going to say Caren wanted to say something. I think Ian might have some input as to how this came about based on state law and I see Mr. Arakawa wants to say something.

Committee Chair Bynum: We will have public testimony. Was Mr. Arakawa part of the working group?

Councilmember Yukimura: He was part of the working group.

Committee Chair Bynum: Then that would be fine. Caren, did you want to say something? I am sorry if I am confusing things but I think this is important for the public to understand and I am really addressing two (2) issues. One is the removal of activities and the other is the purpose section because in my mind, coastal hazards was a primary purpose but not the only purpose of this law.

CAREN DIAMOND: Thank you. Caren Diamond. I wanted to address the activity question and it has been one (1) of the issues that as the community coastal advocates we have disagreed with because we feel like activities...it comes down to the County to regulate use, activities, and structures by HRS 205. That is what the County is told to do and by saying that you are going cut it out of the Shoreline Setback regulations, and only deal with it in the SMA regulation, then we will have no associated setback policy with it. So when the Planning Commission goes to review it there will be no setbacks that are regulated under that whereas right now if you are looking at doing a user activity you have to do what that setback is. So if you had a seventy foot (70') setback your activity would happen seventy feet (70') back and the way it is written now as proposed if activity is taken out of it that forty foot (40') minimum is all that the SMA will regulate. It was defined...it is added back in here as prohibited activities. So the only activities that the Shoreline Setback Bill addresses and regulates are prohibited activities and that to me does not make sense at all. Think about that, you are not talking about any activities in here. It is cut out of the Bill but what is prohibited is what you are regulating as being prohibited. So I think that is a failure in the Bill and if activities are not regulated through this as Maui regulates activities through their Shoreline Bill, 'Oahu regulates activities through there Shoreline Bill, our 1970 shoreline setback regulation regulated activities and structures. It was not a new thing put on in 2007 and so you are looking at making a new policy and cutting activities out.

Committee Chair Bynum: If I could follow-up on that because I recall this from years ago can you give me a pragmatic example of what might occur in the shoreline that you are concerned about.

Ms. Diamond: What if somebody was to set-up a massage activity? It could be weddings, it could be massage tables and things that get set-up every day and taken down every day and happen right at the setback. If there is no regulation, how would you know if it is in the shoreline setback or in the public domain?

Committee Chair Bynum: I mean I have seen these issues where commercial activities are occurring in a public space, or like renting cabanas and it turns out they are on the public beach kind of thing. Is that the kind of concern you have?

Ms. Diamond: Yes.

Committee Chair Bynum: Your position would be then that the setback should apply to activities as well. If you are going to do any of these types of activities they should not be...the SMA is forty feet (40') you said but this could be seventy to one hundred feet (70' – 100').

Ms. Diamond: Yes, except for minor activities where defined and it has been taken out of the draft before you but in previous versions minor activities as defined and they are allowable.

Committee Chair Bynum: So for today and we will go to Mr. Arakawa, where I am framing is the Department disagrees with your position. They are saying, "No, the SMA is sufficient and more applicable and a better model for us to use and you are saying that would allow activities perhaps in the setback that this Ordinance as currently written at least would have to be scrutinized or banned.

Ms. Diamond: That is right.

Committee Chair Bynum: Okay. And I want the public to understand what these issues are too and I think this was very helpful. Mr. Arakawa, did you have something you wanted to add?

DAVID ARAKAWA: Yes. David Arakawa on behalf of Land Use Research Foundation, also formally Corporation Council for the City and County of Honolulu. First, with respect to the original purpose of this Ordinance, it is here listed on this sheet that was prepared by Council Services. So you can read it and like Councilmember Yukimura said in no place does it discuss the restrictions on view plains or activities. It is all about natural hazards; tsunami, high surf, sea level rise, hurricanes, coastal flooding, coastal erosion that poses dangers to people and property near the shoreline. Proper sighting of structures based on hazard recognition, long term planning principles is critical to the protection of life and property, mitigation of coastal hazards, and preservation of coastal resources. It

goes on and on and the purposes of it and the fact that it is based on setback data from coastal erosion studies as explained by Councilmember Yukimura. That was the purpose. If you take a look at that it gives a great purpose and we believe that the current purpose as stated in the revised draft is consistent with the original purpose which is to protect life and property relating to structures based on scientific data and natural hazards. That is the first point.

The second point is that activities is along the shorelines a very, very important issue and everybody that was in the working group believes it was a super important issue but not in this law. It is covered under as many of the speakers have spoken already under the SMA permit and because they believe that activities should be regulated along the shoreline, it is here on page 2 of the revised draft. Page 2 of the handout, paragraph 2 at the top. It was so important that we wanted to make sure that the public understood that this law, Setback Law was for structures, right? But the activities was so important to be regulated that in paragraph 2 up above it says, we added this provision all other activities "shall be regulated by the Special Management Area rules and regulations of the County of Kaua'i." So it could not be clearer and it points that look, any activities along the shoreline shall be regulated by the SMA Law. That is a specific reference to if you are worried about activities, this is where it is regulated. It was so important that it was mentioned a second time on page 6. You can go to page 6 and under paragraph 6 on page 6, it is right about the middle. So it is important for the public to know that this was an important issue to the group. But to many members of the group and many members of the group felt that we needed to call it out a second time and here it is called out a second time. It says, "the requirements of this article shall not abrogate the requirements of Hawai'i Revised Statutes 205A, the Special Management Area rules and regulations of the County of Kaua'i or any other applicable statutes, codes, ordinances, rules, and regulation or other law." So this is the second place where the group decided, hey look, we need to make sure that people understand that the activities are regulated under the Special Management rules and regulations of the County of Kaua'i.

Committee Chair Bynum: Yes, Councilmember Chock.

Councilmember Chock: Chair, I just had a question to the Planning Department if that is okay.

Committee Chair Bynum: Let us just finish with Mr. Arakawa, see if there are any questions for David, and then we will move to that Councilmember Chock. Councilmember Kagawa.

Councilmember Kagawa: Thank you, David. "Shall not abrogate the requirements," what is that?

Mr. Arakawa: Whatever is in this law, the public must comply with. They are not given a free pass on the State law or the SMA rules; the Kaua'i County SMA rules. So they must comply and so things like weddings, massage, commercial activities, backyard *pā'ina*, *kanikapila*, volleyball, games next door, your neighbors are having a volleyball game next door, near the shoreline, those things are regulated not by this Shoreline Setback Bill that deals with structures and protection of property basically and natural hazards; tsunamis, wave action, those kind of things. It is regulated under a different law.

Councilmember Kagawa: Thank you.

Committee Chair Bynum: Just playing devil's advocate for a minute, the laws currently written, the Planning Department just told us it requires them to do intervene on every...they are saying it is ridiculous because it requires so much. Thank you for pointing out that the law says this law still exists but those provisions in the law have no real world impact what-so-ever, correct? They just pointing us in the direction saying that we are not going to do it here anymore but we are still going to do it there.

Mr. Arakawa: And those activities are regulated under the SMA law. They are better regulated...

Committee Chair Bynum: To me you put those pointing kind of words in there because you want to justify removing something. I am just playing devil's advocate. That is fine, I am not objecting but those languages that you pointed out, that point and say well this law still applies...

Mr. Arakawa: Well hundreds of laws...

Committee Chair Bynum: It is just window dressing, right?

Mr. Arakawa: Hundreds of laws in the Hawai'i Revised Statutes under the legislature and all of the Councils of the County refer to state law and have this exact same type of language and if you...

Committee Chair Bynum: And I am not objecting. I just want to point out that it has no impact. It is just pointing.

Mr. Arakawa: It has major impact if it is said...

Committee Chair Bynum: Well the law that you are pointing to does.

Mr. Arakawa: If you would rather have a provision in there saying you do not have to comply with state law, you do not have to comply with the SMA...I mean that would be unwise.

Committee Chair Bynum: It is just for clarification, correct?

Mr. Arakawa: It is to address issue of activities and clearly tell the public and not confuse the public. We are not here to confuse the public. We are here to let the public understand that the County, landowners, and everybody here at this table are concerned about activities, concerned that activities be regulated, and the place to do it is in the SMA statute.

Committee Chair Bynum: Do we have other questions for Mr. Arakawa? If not, Councilmember Chock, you wanted to ask a question of Planning.

Councilmember Chock: Under the same subject, I know we are not going to get to the end result here as we are still looking for that opinion but it does kind of concern me, talking about prohibited activities but not the other activities and so my question is about administration because what I heard clearly was that we cannot administer this stuff but we cannot administer the prohibited stuff either, right that is identified in here. My questions would be what are we doing in the current SMA in order to insure that; 1) What I am hearing it there is some setback reference included; and, 2) Whether or not that should be or not taken out completely. So what kind of recommendation is there?

Mr. Hull: Technically, the prohibited activities are somewhat what Mr. Arakawa is also going into. It is what is covered under state law. Those are prohibited activities under the SMA Law as it is saying these are prohibited there. Under either one we would still...I mean even if it was not in there the Department would still be required to go out there to enforce those laws because we are under the SMA.

Councilmember Chock: So maybe the question is why was it decided by the committee to include the prohibited rather than the other activities that are not?

Mr. Hull: Just to be like Mr. Arakawa kind of said, just to be clear with the public what is and what is not.

Mr. Arakawa: And Councilmember Chock, I think what Kaʻaina said is very important. You include those kinds of activities; backyard *pāʻiana*, volleyball games in the backyard, *kanikapila* in the backyard, then you have to tell that resident, "you have to get a shoreline certificate for your party,"

your weekend party. That is the part that is going to be hard for them to enforce, requiring every backyard party to have a shoreline certification. That would be almost impossible for any County to enforce.

Councilmember Chock: I understand that. Thank you.

Committee Chair Bynum: We have to take a break soon but I want to recognize Councilmember Hooser and then we may need to do a caption break.

Councilmember Hooser: Yes, for the Planning Director, thank you very much. Could we not just clarify activities? I mean throwing backyard parties and volleyball games is not a realistic argument to make. Even if it is so we could theoretically say commercial activities or activities that meet a certain criteria, exempt out cultural, tradition...that could be done, right? There is some middle ground from saying all activities and certain activities.

Mr. Dahilig: We actually tried going down that exercise and there is...as an island community, we engage with the shoreline in many different ways and trying to go through that exercise of what mirrors what should not have to go through a thirty thousand dollar (\$30,000) shoreline determination versus what should I think we started to narrow down to this real issue of okay, what is the goal of this? We are trying to make sure that the shoreline either progresses or regresses naturally.

Councilmember Hooser: Right.

Mr. Dahilig: So that is the overall arching issue...

Councilmember Hooser: If I could interrupt you for a second.

Mr. Dahilig: Sure.

Councilmember Hooser: Because I want to talk before we run out of time here. I understand that is the position of the Planning Department, to deal with erosion issues but if the Council wanted to as a policy decision encompass activities which are already encompassed we could make it more easily to administer for you in some ways, in my opinion. I think it is a policy call. The SMA is a State law, it is not a County Ordinance, right? The State gives us the authority to enforce the SMA Law. As it exists today, the public has two (2) alternatives, the SMA and what is on the paper right now and by taking that out it diminishes the protections of the community, right? I mean it diminishes protections and we could improve that is my point.



Mr. Dahilig: I guess it becomes a question of efficiency of enforcement in this circumstance because I do not disagree that those particular activities or these things need to be regulated but given our departments ability to enforce, what is the most appropriate mechanism to do so. Under Chapter 205A part 2 we are now afforded the opportunity to make SMA rules or an Ordinance, either one. We can do both, we have an SMA rule set, we have actually amended that rule set as recent as 2011 and Caren as well as many other people in the public provided input to strengthen our SMA rules. So the ability to have County input in the regulatory process and mold it to what our needs are done in part 2. That is also clear from part 3 and I think that Ordinance back so many years ago was in response to the fact that there really was not the opportunity to have, to actually create those rules. You can do Chapter 205A part 3 either by rules or by ordinance because there was a deficiency there the Council stepped in and said, you know what, you guys have to treat this like law now. So that is where this Ordinance came from. It is certainly in the purview of the Council to mold this particular Ordinance to reflect whatever policy protections are needed. We are just reflecting and saying that that policy call that was made back in 2007 or 2008, I believe, is not leading to an efficiency of enforcement for this issue.

Councilmember Hooser: Thank you. And I understand and I support making it practical in terms of implementation. The other side is that by just taking it away wholesale it in fact diminishes the public protections so I believe there might be some middle ground where we could limit it to commercial, and or other criteria and not diminish or make it easier to implement and still retain some addition public protections is my point and I would like to think that good people working together can come up with language to do that.

Mr. Dahilig: Certainly it is as you see not a resolved issue. I think we have gotten to a junction where we agree to disagree on this. Whether there is another creative solution to this I do not know. I think what we can describe as our workload and our logistical challenges with the current law is only what we can bring to the table as to what the deficiencies are and we can at least with a certainty point out that particular activity phrase has lead to in our opinion a backlog of determination request with our staff and whether that is the best use of the regulatory staff to enforce and protect the shoreline in terms of what they are doing versus what should they be doing I think is the discussion here.

Councilmember Hooser: Thank you.

Committee Chair Bynum: I think it is time for us to take a caption break so we are going to come back promptly in ten (10) minutes.

There being no objections, the Committee recessed at 11:10 a.m.,

The meeting was called back to order at 11:22 a.m., and proceeded as follows:

Committee Chair Bynum: I think we added some of the key issues here that needed to be discussed and there is no intention to bring this Bill to a conclusion today as I understand it but we do have special council coming up at 1:30 p.m. so we definitely want to complete this before lunch if possible because it is not going to be the final day. Having said that I just want to put one (1) thing on the record then I will go to Councilmember Yukimura. I asked the staff to pull up the original findings and purpose which are not...and I have read it and I just want to read one (1) paragraph because this is what spoke to me at the time. The shoreline environment is one (1) of Kaua'i's most important economic and natural resources. Kaua'i's beaches provide scenic beauty and recreational opportunities for residents and visitors. They are culturally important to the people of Hawai'i. Then it goes into coastal hazards and says beaches provide important habitat for sea birds. So when I looked at this Bill it is like this is about the coastal zone. It is about the economy, about natural resources, about scenic beauty, about recreational opportunities, about habitat. All of those things so that is the point that I was trying to make earlier that to me this was a Shoreline Setback Bill and setbacks have more purpose. They have these other implications as well; scenic beauty, the economy, and so I just wanted to...because everybody said that was not in the original Bill. Well it is in there as far as I am concerned with this language. Thank you very much. Councilmember Yukimura, you wanted to proceed?

Councilmember Yukimura: Yes. Okay so we are continuing on. I think we were on page 9 going onto page 10 which are procedures for obtaining determinations. I think I might need Ian's help. Ian, can you take the stand? This explains the procedure and I believe it also affects the question that Councilmember Hooser raised about appeals of decisions. So I guess the heart of it is that on page 11, we are requiring a posting of all of the Director's shoreline setback determinations and determinations of exemptions within ten (10) working days of his decision to a publicized website maintained by the department. So this is even earlier upstream giving public notice of his decisions. Before I think they had to wait till the Planning Commission agenda was published but now it is early. There are two (2) types of determinations; at least two (2). One (1) is to determine applicability, right? Whether the law applies or not is one (1) point. Is that right, Ian?

Mr. Jung: Deputy County Attorney Ian Jung. I think conceptually just so the Councilmembers understand how we have modeled the proposed amendments is sort of how Department of Land and Natural Resources (DLNR) deals with some of their decisions because when DLNR makes some of their decisions, some of those decisions get to be appealed...their Director decisions get to be appealed to the Board of Land and Natural Resources (BLNR) itself. Similar to how certified shorelines are done, the Director makes the determination but then

someone from the public can then go and appeal the determination of where the certified shoreline is to the Board of Land and Natural Resources. In the current law, the way it is set up is the Planning Commission accepts the decision of the Planning Director but now the way we style it is similar to how the certified shoreline process works where the decision is final until there is an appeal taken to the Commission. So then you go through an appellate process before the Commission but to get there you need to identify what decisions are appealable and if you look on page 11 the first threshold question is whether or not the law applies. Basically what is going to happen is the law...the five hundred foot (500') for abutting, and five hundred fifty foot (550') non-abutting, there is going to be a determination whether or not the law applies. If it does not apply and you are outside that initial determination of threshold then you are not even subject to the Ordinance but if you are within that five hundred foot (500') buffer, we are calling it a buffer, then you are going to be subject to several determinations and decisions and those are listed on, if you go to the next sheet I believe. Those are listed on page 11. So within sixty (60) days from the day the application is deemed by the director there is going to be A, B, C, D, and E. Those are the determinations that can be subject to a decision making by the Director.

Councilmember Yukimura: Where is it? On page 10 and straddling onto page 11.

Mr. Jung: On page 11 then you have B, C, D, and E which are the determinations. So the second step then is once the application is complete then the Planning Director is going to have an obligation to post that application on a website maintained by the Planning Department. So then there would be notification similar to what they do with the SMA minor permits. They are going to put a notification on the website saying these are the pending determinations. And then moving further down the Director will then have to notify the Commission on its next regularly scheduled Commission meeting and basically put on some kind of notification provision so the public will not just have the website to look at what the determinations and applications, but also the six (6) day Sunshine Law requirement and posting that they will be able to go in and take a look at the application and determinations and then they can make a choice whether or not to appeal that decision to the Planning Commission. If they appeal that decision to the Planning Commission then it goes into what we call a contested case, agency type hearing, and then it goes into its own separate process. But if there is no appeal and no action taken on prior to that commission date then it is done and the Director's decision gets approved at the close of the agenda item. So essentially there is going to be this availability to the public to challenge Director decisions regarding the calculation and exemption determinations. And then if there is an appeal then it goes through the Planning Commission process of dealing with the contested type hearings.

Committee Chair Bynum: So I will follow-up with one (1) question anyone can file an appeal?

Mr. Jung: Yes. As long as they meet standing threshold and the standing threshold in the State of Hawai'i is relatively slim.

Committee Chair Bynum: Any other questions regarding this issue for Ian? Where do we go next?

Councilmember Yukimura: I think we go to variances. I think on page 13, we are just substituting the word structures for a variety of facilities or improvements. We are in "variances." Starting on the bottom of page 12, there is a criteria for approval of variances and a variance may be considered for the following and these come from the State Statute 205A right, Ian?

Mr. Jung: Correct.

Councilmember Yukimura: Cultivation of crops, aquaculture, et cetera. The really important one (1) is at the bottom of page 13, construction of new dwelling unit and so that spills over to the top of page 14. You will recall that in the last decision making that this Committee did on this Bill, it is highlighted but I think it is actually in the existing draft. We changed the minimum shoreline setback from thirty feet (30') to forty feet (40') and you will see that in the middle of page 14. I believe that is already in the draft; right, Peter? So it should not be highlighted. I mean this is already in the draft. It should not even be underlined. Maybe it was forgotten and we added it on but the decision was actually made in Committee but it might not have been covered in the draft by mistake. Then all we did was say that you could not go lower than one thousand square feet (1,000 ft<sup>2</sup>). Everybody, we are okay on that? We are allowing people to build a home but if they cannot make the minimum setback they are having to make their house smaller and reduce the side setback and the front setback.

Councilmember Hooser: Question.

Councilmember Yukimura: Yes.

Councilmember Hooser: Chair, can I?

Committee Chair Bynum: Yes, Councilmember Hooser?

Councilmember Hooser: It may be housekeeping but on page 14 the middle of the page, the forty feet (40') there is a...it looks like it deletes everything...okay, never mind. It deletes all of those words but...

Councilmember Yukimura: And then the next section is 12 from the middle of page 14. Rebuilding of an existing dwelling unit, so there are two (2) types of dwelling units that would be allowed to get a variance; one (1) is new construction and one (1) is rebuilding of an existing unit that might have been destroyed by tsunami or fire or whatever and they are allowed the same process that they would reduce their footprint in order to meet the setback requirements but they shall not go below one thousand square feet (1,000 ft<sup>2</sup>). Then the second half of page 15, before granting a hardship variance the Commission shall find and it has things that the Commission shall consider before they issue a variance. In the very end of page 16 at the end of this Bill, actually the highlighted provision on the bottom of page 16, I believe, this is included in draft 1. It was a proposal for Councilmember Rapozo that we would not grant a shoreline setback variance for structures that did not have valid permits. So we would not allow shoreline setback variances for after-the-fact requests. I believe that Planning agreed to that.

Committee Chair Bynum: May I follow-up on that? Explain how does this deal with after-the-fact permitting.

Councilmember Yukimura: This does not...you cannot get a variance.

Mr. Dahilig: Yes.

Committee Chair Bynum: Okay.

Councilmember Yukimura: So it encourages people to get permits and not build without permits because doing that would deny them a chance to get a variance.

Committee Chair Bynum: Previously you could after-the-fact permit without this? Okay, thank you.

Councilmember Yukimura: So that really should encourage permit applications. So that is it and I am open to questions and I am sure that our working Committee is too, as well as our attorney and if there are no questions then we can go to public testimony, Chair.

Committee Chair Bynum: Is there anyone on the working group that would like to add anything to this discussion? Caren.

Ms. Diamond: Thank you. Caren Diamond. I was hoping we could pull up a few of the slides from Ruby's presentation especially the one that shows the two (2) different types of shorelines.

Committee Chair Bynum: Scott is working on it so we will do that.

Ms. Diamond: Thank you. Ruby's presentation was really good and explained how the setback works in all kinds of scenarios. What I find missing is the exemption because some subset of lots are not going to have this. The rocky shorelines that are thirty feet (30') above sea level, on a rocky shoreline and out of the flood zone, basically are exempt from the determination process and so one of the reasons I want to show this is you can see where the sandy beaches are and that what was studied. The rest of the coastline along there are rocky cliffs. I do not know how high they are but they were not studied. Now if they are thirty feet (30') high the setback on those will only be forty feet (40') and they will not be subject to a determination and currently they would have one hundred foot (100') setback on a sizable lot there but that is going to be reduced and they are not going to be included in this whole strong scenario of coastal protection and so the way the law is written right now all lots, no matter whether they are rocky, sandy, studied or not studied are subject to either erosion based or the lot depth based setback. The main change in what is presented before you is that there is a subset of properties that will have no regulation, that will not be subject to the determination, that will not have this strong protection and so if you look at this coast, I believe that is along Kealia, all along those rocky cliff areas you could have houses that pop up forty feet (40') everywhere and this goes for every single...I believe there is forty-seven percent (47%) of the shorelines of Kaua'i are sandy and fifty-two percent (52%) are rocky shorelines and over the course of working with this working group we asked a lot of times where these exemptions would apply? What lots would apply? How many lots on Kaua'i are going to have no protection? And we are told that it is an unknown. That there is no quantification of these three (3) criteria and so my question to you is why is this being proposed in our Ordinance? Who benefits from having no protection where it was not studied? And I think that is the main difference in our working group of disagreement that remains within this Ordinance and so we would ask you to take out the exemptions for rocky shorelines. It is known as the "bright line exemptions." It did not exist for the first year the working group worked together. It came in once the Land Use Research Foundation came in, these what is called the "bright line exemptions" came in and you heard Planning say they do not necessarily...it is not something that they asked for and I would ask you to please take out these exemptions and the only way I could see you letting them stay in is if it is really quantified. Where does this apply to? How many lots? What happens to all of those lots without protections? Where will they be measured from and is this good planning?

Committee Chair Bynum: I want to follow-up and understand this because you are saying these things and people in the audience are going no and so let us look at this. You are saying that all along that rocky shoreline it is forty feet (40') regardless of the law? I thought Ruby said, "it is forty feet (40') or."

Ms. Diamond: Here is the distinction. If you are thirty feet (30') above sea level, you are out of flood zone, and you are on a rocky shoreline, you are scot free. There are no setbacks that apply to you. The determinations do not apply to you. So we are not given any information and I would encourage you to ask for the information. What shorelines are they talking about? What properties? How many properties are thirty feet (30') above flood zone are in rocky shorelines and would not be subject to this and is that a good policy? We do believe that lots should be fairly treated whether you are rocky or not.

Committee Chair Bynum: Caren, I am going to make this more pragmatic. For me the concern is the current law requires setback from all shorelines, correct?

Ms. Diamond: Correct.

Committee Chair Bynum: And I will just be blunt. It is like you have whatever shoreline you have and you have a rocky cliff, I want it setback from the bluff. I want there to be that, right? I think it is important for these reasons that were in the original purpose that it is a recreational, scenic beauty, all of these reasons. And so my question earlier was is there a circumstance where a home under this provision can move closer to the bluff than the current law? That is my key question.

Ms. Diamond: The answer is if it is thirty feet (30') above sea level on a rocky shoreline and out of the flood zone, yes.

Committee Chair Bynum: So the answer is yes? And we do not know where because nobody has quantified which lot...it is kind of like which lots have been subject to the one time subdivision that I asked ten (10), twelve (12) years ago and still cannot be answered. Does everyone in the working group agree with Caren and what she just said that under this law there are instances where homes could be built closer to the bluff than under current law? I do not see anybody disagreeing. And then your view of that would be rectified by removing Section 8-27.3, the new wording in essence, all of it.

Ms. Diamond: Yes, so the small "A"...

Committee Chair Bynum: I am sorry...I am listening to Caren.

Ms. Diamond: Sorry, so it is 8-27.3 and it is the small "A" that...the exemptions are in the 1(a), (b), and (c).

Committee Chair Bynum: 1(a), (b), and (c)?

Councilmember Yukimura: Just 1.

Committee Chair Bynum: Just 1?

Councilmember Yukimura: I mean Section 1.

Committee Chair Bynum: Section 1 includes (a), (b), and (c).

Ms. Diamond: Yes.

Committee Chair Bynum: So that is the bright line that you are uncomfortable with?

Ms. Diamond: That is correct.

Committee Chair Bynum: But the rest of it...but Section 2, you are okay with?

Ms. Diamond: Yes, Section 2, I am okay with.

Committee Chair Bynum: See, now I am really clear what it is you are suggesting and I am really clear that no one is disagreeing with you that this provision would allow homes to be built in instances closer to the bluff thus impacting the view plains from the beach and other places. Correct?

Ms. Diamond: That is correct.

Committee Chair Bynum: Okay, thank you. Councilmember Yukimura.

Councilmember Yukimura: Mike, I have a question for Planning.

Committee Chair Bynum: Sure. I am sorry, Mr. Kagawa did I not see your hand.

Councilmember Kagawa: I did not ask a question all day.

Committee Chair Bynum: I am sorry. I did not see your hand.

Councilmember Yukimura: That is fine.

Committee Chair Bynum: Mr. Kagawa, the floor is yours.



Councilmember Kagawa: I see a gentleman from the group who is an expert and he was wanting to answer Caren's question, I think. Caren asked a question to us and we have a person from the group that maybe can shed some light to here to answer her question. I think that would be a good way to start.

Committee Chair Bynum: I was looking for that. I did not recognize Mr. Conger was seeking a response. Go ahead.

Mr. Conger: Thank you, Councilmember Kagawa. Thank you, Chair. Again my name is Chris Conger, I am with Sea Engineering. I was a part of the working group and I just wanted to elaborate briefly on what Caren is discussing. Caren is talking about one (1) very isolated incident where we have postulated that the coastal hazards do not exist. It is high elevation, it is above thirty feet (30'), it is a rocky coastline as we have talked about before, non-erodible, non-dynamic, hard sub straight so there is no erosion, issue and it is outside of the V in the VE zone as defined by FEMA which is the coastal high hazard area where waves would be an impact. In cases like these and there are few and far between that you would meet all three (3) of these criteria, then someone could qualify for the minimum which would be forty foot (40') setback. They would automatically be given that forty foot (40') setback in this case where we have identified no coastal hazards exists and that is the exception.

Committee Chair Bynum: I am going to follow up on that.

Mr. Conger: Yes.

Committee Chair Bynum: This is based on discussions with Ruby as well. I understand that this provision I looked at it in terms of coastal hazard, and by understanding is Sea Grant's position is, given these three (3) criteria this addresses the concerns about coastal hazards on this particular property?

Mr. Conger: Correct.

Committee Chair Bynum: Is that a fair conception?

Mr. Conger: That is my understanding in discussions with Ruby, Dennis Wong, and Dolan Eversole that we agreed as a group that these three (3) criteria could effectively discriminate those few locations where coastal hazards were not present.

Committee Chair Bynum: That is why I brought up the discussion earlier. If this is just a coastal hazard bill, great, but there is a policy question here also about esthetics and view plains and that to me was always part of the purpose of this Bill. It certainly had that and we just heard that it has applicability whether

it was intended or not, it currently is causing some setback from bluffs that we would be illuminating. Does Sea Grant have a position on that policy?

Mr. Conger: I am Sea Engineering, she is Sea Grant so I will defer to Ruby at this point. Thank you.

Ms. Pap: Ruby Pap, Sea Grant. To clarify a little bit about Sea Grant's role in this process. We have been part of the working group. I see my role mainly as advisory. We are not here to say yes or no or provide clear decision making by saying, "you must do this." We are here to provide advice and scientific data where needed and options. So I just want to clarify that. There are lots of different ways to do exemptions. I think that you know in this case there are cases where exemptions are warranted because this Bill is very complicated and hazards may not affect all properties. In terms of this current proposal, we looked at it and we said as long as all three (3) of those criteria are present, not any one (1) of those taken alone but it meets all three (3) criteria including the definition of a rocky shoreline...I do not know whether this shoreline meets that definition or not, so all three (3) criteria are met and then there is that minimum still of forty feet (40'), then it is probably okay from a hazards perspective.

Committee Chair Bynum: Right, but Sea Grant does not have a position on the policy of whether we should setback further for esthetic reasons?

Ms. Pap: Since I have been part of this process for about two and a half (2.5) years now, we have mainly been asked to look at it from a hazards perspective so I have not investigated options for esthetics setbacks. I am sure there are lots of options but we have not been...

Committee Chair Bynum: Because we have not been asked to.

Ms. Pap: Exactly.

Committee Chair Bynum: I want to further clarify your role because I am very proud of the Sea Grant role in our community and in our County, so for the public, Ruby is an employee of the University of Hawai'i, correct?

Ms. Pap: Yes.

Committee Chair Bynum: Assigned to Kaua'i to provide technical assistance to the Planning Department, Councilmembers, Mayor, whoever asks. You are asked does this meet the criteria for coastal hazard and the opinion was yes?

Ms. Pap: Yes.

Committee Chair Bynum: And I have said on this floor many times Dennis Wong and Dolan Eversole were our first people who were engaged in this and are still involved so thank you very much for that answer. My concern is like I said other purposes. Yes, Councilmember Yukimura? Did you have any questions Mr. Kagawa?

Councilmember Kagawa: I feel like we are doing a lot of discussion during time for question and answer and I have some discussion as well but I think we should follow our normal process. Ask questions and in the end let us summarize our feelings maybe prior to doing the deferral.

Committee Chair Bynum: I thought people have been pretty focused on questions but I will take that under advisement. Yes, Councilmember Yukimura?

Councilmember Yukimura: Actually, I have asked that Planning be asked, I think, the question is do you have provisions under the SMA process to account for esthetics in the siting of houses along the shoreline?

Mr. Dahilig: I would say we actually have robust opportunity to regulate esthetics and view plains through the SMA Law versus the Shoreline Setback Law, because at the end of the day, what we issue is not a permit. Unless it is a variance we do not issue a determination which is in it of itself a line. So conditions like the color, the height, the treatment, the landscaping these are things we cannot fold into the drawing of a line because again it is not a permit it is a determination of where the line is drawn. Unless it is a variance situation. So just to answer to answer your question, Councilmember, we do have that opportunity under SMA. In fact it is a more robust opportunity and in many cases is a public opportunity when you bring things before the Planning Commission. Especially when you are looking at those things that the State declares as being over five hundred thousand dollars (\$500,000) and meeting development criteria that is in HRS 205A part 2. Use permits that allow the public to even intervene and created contested case hearings are afforded only in HRS 205A part 2 and not in HRS 205A part 3 which this Ordinance is organically linked to. There is that protection.

Mr. Hull: If I can also add on top of that. While there may be some discussions about esthetic purposes, view plain purposes, or environmental purposes within the original context of the purpose for the Ordinance, right now in the Ordinance or even the proposals you have before you, there are no mechanisms for reviewing and regulating say view plains or things like for watershed or for birds or for whatnot. There is no mechanism in place. Right not the mechanism you have in place are being proposed for what is in place in the existing Ordinance is just essentially an erosion rate calculation or a lot depth calculation as the potential coastal processes can affect an improvement or that

improvement can affect those coastal processes. If it is the Council's prerogative that they want to go into looking at drawing setbacks say uses, environmental concerns, or for beach concerns which was actually in the State purview, with the exception of beaches under DLNR, you can go into that realm but there is not mechanism set up. Right now this is a thirty (30) page Ordinance, a very complicated Ordinance that addresses, like Mike said, just drawing a line in the sand. You are essentially establishing a line and in any other situation on a property line a setback is established five feet (5'), it is ten feet (10'), boom, we are able to draw it. The shoreline is malleable organic so it moves so to draw that line is a very laborious process as well as a very costly process on an applicant as well as the Department. So we are trying to say is if we can focus it into those areas that are necessary and those areas that we do need to take the time to look at. If we want to go and look at like I said going into the environment that can be done but it is already being established under other State laws right now, but to try and focus it on just that drawing of the line.

Committee Chair Bynum: I do not want to belabor this debate and I wanted to clarify clearly that the current law, if we make this change it is going to have...I understand all of your arguments, Ka'aina about in the SMA you have a mechanism but the fact is that this law currently is keeping homes being built further from the bluff and if we change it they are going to move closer. I have a problem with that personally and you may convince me that there is another way to go but I do not want to belabor that discussion today. We have a clear outline of what the amendments are and what is being proposed and I want to entertain other discussions as Mr. Kagawa said move for us to make closing comments and move this for two (2) weeks and then maybe take votes. I think that is the intention. Given that context is there more to discuss now? Councilmember Yukimura.

Councilmember Yukimura: I just want to ask Deputy County Attorney if in establishing say a one hundred foot (100') setback line would be otherwise exempted by the proposed bright line exemption, would be vulnerable to a legal case if we did it under this law?

Mr. Jung: Deputy County Attorney Ian Jung. We could be vulnerable but it all depends on the facts and circumstances of the particular case at hand but I just want to clarify that this is not a bluff setback ordinance. We are talking about a Shoreline Setback Ordinance so where the bluff is in comparison to where the shoreline is those are two (2) completely different things. I want to remind the Council that when we talk about a shoreline setback determination that is a ministerial of determination, basically applying the standard in calculation and then making a decision. When you get into the realm of a variance that is when there is the elements of discretion where you can apply looking at adding conditions for esthetics and view plains and things like that because built into the CZO as well as the North Shore Development Plan there are already height limitations that you

can go to and those are broad policies that have already been adopted through the Comprehensive Zoning Ordinance as well as the North Shore Development Plan. So those things are already anticipated that follow the objectives and policies of part 1 of HRS 205A. So you have to look at part 3 as separate and apart from part 1 and 2 for the objectives as well as the SMA laws.

Councilmember Yukimura: One (1) more follow-up question.

Committee Chair Bynum: Okay. Councilmember Yukimura.

Councilmember Yukimura: Thank you. If it is a thirty foot (30') high rocky shoreline, the shoreline would actually be down at the ocean level, right?

Mr. Jung: Correct.

Councilmember Yukimura: And a one hundred foot (100') in thirty feet (30') above would be what? Would it actually end up one hundred feet (100') from the bluff? Would you measure the shoreline that way?

Mr. Jung: It depends on the topography obviously. If it is vertical, then you would look at it as the... you could possibly look at it laterally but I will leave it up to Chris and how you guys apply it at DLNR.

Committee Chair Bynum: State your name for the record again, please.

Mr. Conger: My name is Chris Conger. I am with Sea Engineering, formally I was with Sea Grant, and I was the Shoreline Specialist for the State for about five (5) years. I cannot speak for the current application but I can tell you how we did it before when we developed the policies under the new program. State law, Hawai'i Revised Statute 205A details what a shoreline is, shoreline that should be certified for setbacks and the Administrative Rules 13-222 is the rule set that governs shoreline certification within the State. That process is administered by the Department of Land and Natural Resources in conjunction with the Department of Accounting and General Services, the land survey office there. For rocky cliffs and bluffs there is a subset of the rules which allows for the shoreline to be drawn either at the highest was of the highest wave or at the top of the bluff or cliff if it is a safety concern. So it is always the owner applicant's decision on whether they want to try and place it at the highest wash of the highest wave or if it is not safe for the survey community or the State inspectors to get to that point then they have the option to place it at the top of the cliff or the bluff but again that is the applicant's choice.

Committee Chair Bynum: And again I do not want to belabor this because I think we understand this, but my concern is, you can have a very rocky

bluff but it is forty feet (40') back and the person could build a structure right on top of the rocks. Now he will probably say, no, SMA will have something to say about that but that is a concern that...

Mr. Conger: I understand your concern, Chair, and that is the distinction that between the coastal hazard setback and some other hazard and so often times bluff stability when not affected by shoreline process again the certified shoreline is the highest wash of the highest wave and thanks to Caren and her ongoing work in the legal community; we have Diamond 1 and Diamond 2 both of which tell the State that they have to go to the highest wash of the highest wave not to include tsunamis or hurricanes. So you go to that furthest point that the waves have incurred along that coastline and then you go an additional forty feet (40') that is your minimum. Now if that forty feet (40') is on a bluff then it may be a bluff stability issue but that is not a coastal hazard. That is some other issue that needs to be dealt with separately.

Committee Chair Bynum: Kalapaki Bay has homes built...you know they look like they are falling off of the cliff. I do not want to be on a beach on Kaua'i and look up and see that kind of structure. I am just being blunt and this helps that and I am reluctant to chip away at that.

Mr. Conger: Kalapaki's shoreline would actually be on the face of that.

Committee Chair Bynum: Right. So they could not build those out here.

Mr. Conger: So they could not. There would be no way under the current rules or the proposed amendments to build those ever again.

Committee Chair Bynum: I understand that although there was a new one built just a few years ago so I do not know how they did it. Are there other questions for Chris? Are there other issues we need to discuss before we call the meeting back to order? Yes, I am sorry. Councilmember Chock.

Councilmember Chock: Thank you. The question came before and we have not gotten an answer on it and maybe we cannot to figure out how many lots are going to be affected by this exemption and not included in the erosion study that are affected by the thirty foot (30') mark and I thought that there was some intention of trying to identify that. Is there? Is there something we can look at that would help us through this?

Mr. Conger: I will let Ruby show what she has done. She has done a great job of working with the Geographic Information System (GIS), and

it can identify those lots above thirty feet (30') and it can identify those lots that are outside of the V or the VE zone; the coastal high hazard zone as identified by FEMA. What it cannot tell us is which ones meet the rocky shoreline definition.

Councilmember Chock: Okay, so this might be for you, Chris, and a little bit moving in a different direction but in terms of hazard, is there soil erosion that I need to know about as well in kind of understanding what...because I am thinking like we talked about there is some mixed stuff with rocky to soil and how much of that is subject to the need for us to consider where people put their homes on a bluff and I know that is moving in a different direction but I think it is still important for us to know in determining what gives.

Mr. Conger: I think that is a great point, Councilmember Chock. I think it is important to make the distinction that for the identification of a rocky shoreline, we are looking for those which are not erodible, they are hard, they are non-dynamic and they are dominantly rock. So that does not exclude those that may have some surface layer of soil but what it does do is eliminate those where there is a soil component that is within the wash of the waves or within the coastal high hazard area and so if there is a soil component to the top of these bluffs it is not being affected by the coastal processes. It is some other process and typically those can be a little more stable than the coastline.

Committee Chair Bynum: Are there other questions for Chris?  
Councilmember Yukimura.

Councilmember Yukimura: Chris, that third component which you say is not mappable at this time. We can map the coastlines that are higher than thirty feet (30') and we can map all of the coastal areas that are out of the FEMA flood maps. So the third criteria is the one where you would be concerned about it being a loophole, right? And so I want to ask about how much of a loophole can it be? The property is clearly adjacent to a rocky shoreline. You are saying that the definition of a rocky shoreline is fairly tight but it also includes such that it will not affect or be affected by coastal erosion or hazards. So if there are any doubts that there might be coastal erosion or hazards or that it might not be a rocky shoreline then theoretically the Planning Director will not apply this provision and grant an exception. I mean this is not meant to be granted very easily.

Mr. Conger: Correct. I think the original intent was a small subset, a very small subset of properties with a very rigorous definition where the onus was on the applicant to prove otherwise that they fit within this very narrow definition of which rocky shoreline is fairly exclusive.

Councilmember Yukimura: And then if it does not meet the exemption...so it has to do a shoreline setback. You say the shoreline would be measured by the wash of the waves or if danger is caused then the top of a bluff.

Mr. Conger: And again that is the owner applicant it is their decision as to where they want to try and map a shoreline.

Councilmember Yukimura: It is up to the applicant?

Mr. Conger: It is up to the applicant. If they can safely and I will use even though it is a different island I will use Hamakua coastline on the Big Island as an example. There are very tall bluffs in Hamakua that are being developed. Some of which have access down to the lower terraces where surveyors and the State can actually get down and identify and map the highest wash of the highest wave and some do not. And for those that do not have safe access down to the lower terraces then the default is that they put it at the top of the bluff for safety concerns. That said there are a few cases where it is questionable and the owner just chooses to put it at the top of the bluff for not even wanting to risk health or welfare for the crews that go out and work on the site so it is in there as a safety precaution so that no one is being penalized for taking a safe route with the crews that work on the job.

Councilmember Yukimura: Thank you.

Committee Chair Bynum: So, no more questions for the group?

Councilmember Chock: Are we going to get back to the first question?

Committee Chair Bynum: I am sorry. Go ahead.

Councilmember Chock: If you want to expand on that. Where we are headed with that bright line?

Ms. Pap: Ruby Pap, Sea Grant. This is in regards to a question of whether that those properties were mapped out and as Chris said I did do an analysis; a geographic information systems analysis, of parcels that would potentially qualify for 8-27.3(a)1(a) which I think is the same reference now. The first two (2) tests, those lots over thirty feet (30') and tax map keys (TMKs) five hundred feet (500') from the shoreline, first of all, because you have to map that, outside the V zones and the flood zones and above thirty feet (30') in elevation. We do not have a geographic data set for those lots that qualify for rocky under the Kaua'i County definition of a rocky shoreline, it just does not exist right now so it is not possible. Plus that is more of a discretionary standard as you were just



discussing. So I did two (2) different analyses. I did those that were within a five hundred feet (500') but I also did it for those that were abutting because the five hundred feet (500'), even if you are four hundred fifty feet (450') away but not abutting it may kind of look worst that it may be is because it is really the abutting ones that you are thinking of perhaps. So I separated it into two (2). So for the ones that were abutting under those first two (2) tests and again this is for illustration purposes only. It is not official data because it is using a computer program essentially, there we approximately one hundred ninety (190) properties with caveats because it would select out...even if selected out a property it may only be a portion of that property that is exempt and that is not necessarily the whole property so and I have that information, I can provide it to you, or I can give copies, what have you. On the second one, for those that are within five hundred feet (500'), so not just the abutting parcels for some reason the Excel data, I did not get attached to but I think it was closer to about four hundred to five hundred (400 – 500) parcels but I can get you that information. But again that is not those...that is without the...what I think if you go with this it is going to have to be a case by case assessment of whether or not that is a rocky shoreline or not.

Committee Chair Bynum: Ms. Diamond.

Ms. Diamond: I hoping Ruby can put some of the maps up there so you can see what the mapping looks like.

Committee Chair Bynum: Do we have that available?

Ms. Pap: Do you want the abutting or...

Councilmember Yukimura: You cannot really see though the properties that are...that make the three (3) criteria.

Ms. Pap: I do not have any that meet the three (3) criteria.

Ms. Diamond: So essentially you are being asked to add something into your Ordinance that is indefinable and also want to point out that while Mr. Dahilig was saying that his staff is overworked and activities have to get taken out of the Bill because of that. Now you are adding in a site visit to every shoreline property by the Director to determine is it a rocky shoreline? Is it exempt from the Bill? And instead previously it was the State that came out and set the certified shoreline and then the people would come to the County with their paperwork and the Director did not have that discretionary thing that was based on fact and so I would ask to look at that and also one (1) more thing is I am not sure how we can say that a lot right next to a sand...a rocky lot right next to a sandy lot has no coastal hazards because I think coastal hazards exist on our entire coast and

maybe one (1) coastal hazard does not exist on the rocky shore and that is the sandy beach erosion but the rest of the hazards are the same.

Committee Chair Bynum: Do you want to follow-up Councilmember Yukimura?

Councilmember Yukimura: I just want to say that if there is any doubt it would not qualify for an exemption.

Committee Chair Bynum: I have one (1) other question for the Director. Are there other questions regarding this issue? I clearly understand that if we were going to finalize this Bill today we would have to be here the rest of the day but we are not so I am ready to move on. I have one (1) other question and I want to thank Peter for pointing this out to me. And it was ticking in the back of my mind because you twice said HRS 205 and SMA is the way to go to regulate these things and what about HRS 205 development, the exemption for the first house up to seven thousand square feet (7,000 ft<sup>2</sup>)?

Mr. Dahilig: For the first house, yes that is an exemption over, if you are hitting over seventy-five hundred square feet (7,500 ft<sup>2</sup>) however what tends to be the issue if you look further down is the subdivision triggers and when you have these large lots that are subdivided along these bluffs they try to maximize in agriculture subdivision these views and if it is over four (4) then that is when we trigger the SMA...

Committee Chair Bynum: But an existing lot...

Mr. Dahilig: An existing lot...

Committee Chair Bynum: An existing lot is exempt from HRS 205A.

Mr. Dahilig: Right, but certain...for instance if you look at the circumstance like at 'Anini Beach subdivision. That even before the lines were drawn had to come in for and SMA. A lot of the existing lots that have come in for subdivision, another example is Kahuaina, let us say. All of these different subdivisions have to go through and SMA analysis if you are developing more than four (4) lots within the SMA. If there is an existing lot already, that is subject to SMA the conditions that are there in the permit that address things like view plains or whatever now are then reviewed at the time of building permit application and so that conformance is there to ensure that the SMA analysis that was done for the subdivision is complied with.

Committee Chair Bynum: I am sorry. Right away that raises questions for me. Is a SMA...that analysis was done when and what was the current status of the analysis? I mean it is going to be unique to each property, right? How was the SMA being applied in 1975 when this got done versus in 1990 when it got done? I am concerned you have an existing lot, this says construction...development does not include construction or reconstruction of a single family residence that is less than seven thousand five hundred square feet (7,500 ft<sup>2</sup>) of floor area.

Councilmember Yukimura: That does not apply in the SMA. I mean the shoreline setback.

Committee Chair Bynum: So this does not apply anywhere?

Councilmember Yukimura: In shoreline setback it...

Committee Chair Bynum: Excuse me. I am talking with Mr. Dahilig.

Councilmember Yukimura: Go ahead.

Mr. Dahilig: As with anything given where the authority is coming from for both the SMA regulations and with the shoreline setback regulations. These are creatures of authority that is given under HRS 205A part 2 and part 3. So the State legislator has made a policy decision as recent in that seven thousand five hundred (7,500) language that you are referring to as recent as two (2) sessions ago where they said we are going to exempt these things out for economic purposes or whatever. I cannot speak for what the State legislature did but when you look at SMA, it regulates those elements of development that by State policy they feel are meant to be regulated and if we were to try to develop SMA regulations that were in violation of what the State policy is then we would end up in a superseding type of situation so it is just one (1) of these circumstances again I do not disagree with you that you may have a single family house that may not be regulated under SMA but that is the policy of the State.

Mr. Hull: Can I just add?

Committee Chair Bynum: Okay but your justification for us taking away that County control or County overlay was that the State had it covered and so anyway.

Mr. Dahilig: And that is where we get into this issue of structure versus activity because...

Committee Chair Bynum: This is about a structure.

Mr. Dahilig: That is where you get into this issue of structure versus activity and what HRS 205A part 3 gets into and again HRS 205A part 3 is the exercise of drawing a line and in as much as we are wanting to get into this discussion of regulating view plains again apart from a variance situation view plains generally are not regulated by the fact that you are drawing a line based on calculation. It is meant based off of what under HRS 205A part 3 is after, is the health and welfare approach as part of a multilayered regulatory regime to protect our coastlines.

Committee Chair Bynum: I understand all of that and there are areas that the State does a pretty good job and there are areas where the State has been incredibly neglectful for thirty (30) years. I am a County Councilmember and I am concerned about our island and the State does not always do it and should I not be concerned that this exemption is going to mean that all of these mechanisms you said you have will not apply in these circumstances but our current Ordinance does?

Mr. Dahilig: Even if let us say that for a single family home that you have a circumstance where you are trying to regulate where it is sited because of view plain issues under HRS 205A part 3 which is a line drawing exercise. There is nothing in that calculus that I can do given the authority that comes from the State under HRS 205A part 3 that allows me to push that line further back because it obstructs the view of something else.

Committee Chair Bynum: Thank you. You have answered my question. Perhaps we need a County Ordinance that does that.

Mr. Dahilig: But in terms of this particular law that cannot be done.

Committee Chair Bynum: This County Ordinance is doing that in some circumstances right now.

Mr. Dahilig: Actually, no it is not. It is not because when you say the word activity even if...

Committee Chair Bynum: I am sorry, I am talking about structures and how close they can be to the bluff.

Mr. Dahilig: Right.

Committee Chair Bynum: The law currently impacts that and these homes would be exempt from the SMA so you just finished saying there is no mechanism in the SMA to do this.

Mr. Dahilig: But the mechanism would not belie in the Shoreline Setback Law because in terms of drawing the line and where this would be sited I cannot specifically site a house for shoreline view plain issues, shoreline view plain purposes based off of this.

Committee Chair Bynum: Well we have two (2) weeks to figure this out and I just have to say this you drive to Po'ipū and there is this house that is sticking way above everybody else because they found a loophole in the law and they built the grade way high and it just sticks out like a sore thumb and I know there are people in this room that it bugs them every time they go down there. It is one (1) of our famous stories right? I do not want to go on some pristine shoreline the I am use to being and going and that makes this place so special and look up and see one (1) structure right on the bluff and that could happen because you just told me SMA has no mechanisms to regulate that.

Mr. Dahilig: Again, not no mechanisms. There are specific policy elements that the State...

Committee Chair Bynum: For this exempt home some guys buys a lot that is already subdivided and he is exempt from SMA when he builds his first structure.

Mr. Dahilig: If it is already subdivided and it was more than four (4) lots, there would be an SMA permit that regulates where the siting of these homes should occur.

Committee Chair Bynum: That may have been done in 1972 and not meet our current community expectations. Anyway, again we have two (2) weeks. We are not going to vote on these things today so are there other questions for the panel? If not I will call the meeting back to order and take public testimony.

LORI L. MARUGAME, Council Services Assistant: We have two (2) registered speakers; Carl Imparato followed by Felicia Cowden.

CARL IMPARATO: Aloha County Councilmembers, my name is Carl Imparato. I am sorry if my comments are going to be a little disjoint here but it is hard to figure out what is going on when you do not get information in advance. I have tried to give constructive input to the Council on this Bill on April 9, 2014, June 4, 2014, and July 1, 2014 and on those occasions I pointed out very serious problems in the Bill that included exempting certain types of structures from shoreline certification and setback regulations. Exempting the entire category of activities from shoreline certification and setback regulations and most inconceivably abdicating the public interest to coastal developers or changing the existing one hundred foot (100') minimum setback requirement for large coastal

properties to just forty feet (40') for properties above rocky shorelines. As far as I can tell those problems still exist. There is no shoreline setback determination required for coastal development on the ridges that meet this criteria and there continues to be the reduction of the existing setback from one hundred feet (100') to either forty or sixty feet (40' or 60') depending on whether it is a bluff in front of a rocky shoreline or non-rocky shoreline. I will point out that if there is no requirement for any shoreline setback determination then there is no requirement for any shoreline certification so even then the question is if you have to be setback forty or sixty feet (40' or 60') from where? Where is the...if you do not do a shoreline certification...so that is another problem. The working group includes the attorney for Pierre Omidyar who is the developer that wanted to line the ridge above the Hanalei River with dozens of vacation rental structures and so when we talk about are there dozens of properties that this applies too or hundreds or whatever. To me the question is; is there even just one (1) property that this loophole would apply to because whether it is in Hanalei or on the east side or anywhere else the question is, is there one (1) property that will be build too closely to the bluff and ruin what is otherwise a pristine area? So it is not really a question that it is so important to have account of the number of properties I think that qualify for this. In any event, given the nature of this working group, it is no surprise that the language in Bill No. 2461 seems to be tailor-made to facilitate Pierre Omidyar's scheme. I requested that a red line of the current working draft of the Bill be produced. One that compares the language in the working draft to the language in the current CZO. Not the language in what came out of the Planning Commission. Not the language that came out of draft 1. In order to look intelligently at what is going on here, one needs to compare what is in the proposal to what is in the current CZO. And that still has not been produced and I really do not know how the public or the Council can intelligently work on this without really being able to compare what is on the CZO versus what is in the proposed amendments.

Ms. Marugame:

Three (3) minutes.

Mr. Imperato: So once more I request that a red line compared to the CZO be produced and that includes looking at the amendments *vis-a-vis* the CZO. We need this kind of red line so that deliberations can be based on seeing what is really on the table and what is going to be taken away from what exists today. The stakes are too high, the proposed concessions to coastal developers are too great and the potential harms to Kaua'i shoreline resources are too great to do otherwise. Councilmember Bynum and I believe Councilmember Hooser have pointed out and I have to agree and emphasis that if you arbitrarily claim that this Bill should only be about coastal hazards, you are giving away the store. The existing Ordinance does not just protect private structures from coastal hazards, it protects the public interest. The County Council has a duty to protect the public's interest in preserving scenic coastal resources and that is according to the objectives and policies of HRS 205A. I quote, "protect, preserve, and where

desirable restore or improve the quality of coastal scenic and open space resources.” That is part of what is HRS 205A. That is part of what is in the existing CZO and to basically throw out this red herring that says this new Bill should only focus on coastal hazards and ignore the other important things that are in the current CZO is to really divert attention from the key issue. We cannot just remove the one hundred foot (100’) setback requirements that are in the existing law without considering all of the harms that would occur. Not just coastal hazards but all of the other harms that occur to the public in terms of view plains, scenic resources. The SMA rules and regulations do not have an iron clad one hundred foot (100’) setback rule. It has been pointed out that it does not...these SMA rules and regulations do not even apply to an individual home but for even any new development there is nothing in the SMA rules and regulations that says in some glossy language about looking at the impacts on view plains. Here we have today under an existing law a one hundred foot (100’) minimum setback. Hopefully when one applies the SMA rules and regulations to large processes projects proposals they will say for this particular project you have to have a one hundred fifty foot (150’) setback or a one hundred eighty foot (180’) setback in order to preserve the view plain but at least today we have the one hundred foot (100’) setback and we should not be giving that up and we should not be diverting the attention from that key issue by just harping on the idea which is just a premise, just an argument that this Bill should only be about coastal erosion hazards. It would be fine if this Bill were just about coastal erosion hazards if prior to approving this Bill you improved the County’s SMA rules and regulations or you improved the CZO.

Ms. Marugame: Six (6) minutes.

Committee Chair Bynum: That is six (6) minutes. Okay summarize.

Mr. Imparato: But put into the CZO this one hundred foot (100’) setback requirement and then you can arguably say let us approve this Bill without the one hundred foot (100’) setback requirement but do not just create a gigantic hole that developers are going to rush into when you create this gap between approving this Bill and presumably firming up the CZO later on. Thank you very much.

Committee Chair Bynum: Thank you. Councilmember Yukimura.

Councilmember Yukimura: We have this comparison of existing law which is the current CZO and the Floor Amendment. So please make sure the Mr. Imparato has a copy of that. Where in the current law does it say that there is a one hundred foot (100’) minimum setback?

Mr. Imparato: It is right there basically in the existing shoreline setback determination, establishment of the line.

Councilmember Yukimura: Which provision?

Mr. Imparato: Well if you go to the table, where the formula is for the setbacks.

Councilmember Yukimura: Right.

Mr. Imparato: And I do not have the Ordinance in front of me. I have your hand out from this morning so go to page 4 of the table, average lot depth greater than two hundred twenty feet (220'), the greater of the erosion base setback or a minimum of one hundred feet (100') from the certified shoreline. The existing rules which I do not have in front of me here basically have that and I think it has been acknowledged that for deep lots the lot depth provisions in the existing Ordinance say...they do not distinguish between being above a bluff or being on the coast. Every lot that is greater than two hundred feet (200') has a minimum setback of one hundred feet (100').

Councilmember Yukimura: No. It says if the average lot depth is one hundred feet (100') then the minimum setback is forty feet (40'). If it is one hundred one to one hundred twenty feet (101' – 120') then it is fifty feet (50'). So you are talking about lots more than two hundred feet (200') average lot depth?

Mr. Imparato: Exactly.

Councilmember Yukimura: Okay, but that is not a minimum one hundred feet (100') for every lot.

Mr. Imparato: Fair enough and I have thought I had preface my remarks by saying that I am concerned about the large parcels. I am concerned about the large developments for example, the Hanalei Plantation proposal, which are deep lots well greater than two hundred feet (200') deep. So if I was not clear about it let me be clear. Under the current law for lots that are greater than two hundred twenty feet (220') or two hundred feet (200') or whatever the depth is, there is a minimum one hundred foot (100') setback. Is that correct?

Councilmember Yukimura: For greater than two hundred feet (200') that is correct. So you are just talking about lots that are greater than two hundred feet (200') average lot depth?

Mr. Imparato: Correct.

Councilmember Yukimura: Okay. Alright and so the one hundred (100) lot iron clad setback rule is for large lots, it is not for small lots or average lots.



Mr. Imparato: It is for large lots, I would argue it is probably average lots because most lots are probably greater than shoreline lots. Many are greater than two hundred feet (200') deep but whatever.

Councilmember Yukimura: No, they are not, but thank you very much.

Committee Chair Bynum: Any other questions for Mr. Imparato? Actually it could be greater than one hundred feet (100') but it is a minimum of...

Mr. Imparato: Right. It could be greater if there was more coastal erosion but I am assuming that we are up on the bluff and so the erosion issue is not going to hit you.

Committee Chair Bynum: Carl do you feel that this push is about coastal hazards only? You are saying that if we want this Bill to be just about that, we can address the setback in other portions of the law?

Mr. Imparato: You have a current law that basically addresses several things and if you want to say I want to take that current law and make it only address one (1) of the three (3) things then before getting rid of the protections for the second and the third thing you have to have those other pieces in place.

Committee Chair Bynum: Thank you. I understand that.  
Councilmember Hooser.

Councilmember Hooser: Mr. Imparato, thank you very much for your testimony. It is always very well thought out, I appreciate that. You primarily focused on this one (1) particular issue, the one hundred feet (100') and the setbacks. Do you have any comments or thoughts about the other issues that we debated quite extensively was activity provision and taking that out, do you have any thoughts on that?

Mr. Imparato: I have testified in the pass that I think that it is a bad idea to take out the activities provision. Apparently, and I do not have firsthand knowledge but apparently other jurisdictions, Maui, City and County managed to keep the activities language in their law without bringing their Planning Departments to a grinding halt. My concern about taking activities out is that there may be...when you exclude activities from this Bill completely right now if someone wanted to conduct certain activities on the shoreline property it may very well be that those activities are not prohibited. It may very well be that those activities can happen in the shoreline setback area but at the very minimum there would be a requirement then that property owner obtains shoreline certification so that we know that the activity is being conducted on private property rather than

on public lands. My concern is by taking out activities you are going to have people who are going to conduct their private activities on public lands because there has never been any requirement to come up with the shoreline certification. A member of the public sees this happening. They say this is not right. You are basically say telling me that you can have your volleyball net up here today and then the County says well there is nothing we can do about it because you go prove that is on private property or public property. So I am concerned that it may be reasonable to define activities more precisely because we do not want to do some of the things that we have talked about...prohibit people from having their own picnics but to throw it all out an say we are not going to worry about any activities I see the abuse that is going to happen down the line.

Councilmember Hooser: Thank you very much. Thank you, Chair.

Committee Chair Bynum: Councilmember Yukimura, I really would like us to try to get done in the next five or ten (5 or 10) minutes or else it is going to push back our 1:30 p.m. session. I am going to have maybe three (3) minutes of closing comments. Councilmember Yukimura, you have further questions?

Councilmember Yukimura: So Carl, what private activity do you think would benefit from a shoreline setback? I mean, are you saying that you have a wedding and people might go onto the beach when there is a wedding and that is not good? What activity are you talking about?

Mr. Imparato: I am sure there are going to be cases where shoreline property owners look at ways to make extra money and so they will be conducting either a continuous stream of weddings or let us put all this rental surfboards out there. Now arguably some of these might be handled through hopefully SMA rules and regulations but I am not sure about that but the point is there are going to be some parties who may basically say, advertise on the internet come and do your wedding on my property and they would not be possibly conducting them on their own property. They would be conducting them on the actual public property and there is no problem when people do things once in a while. Everybody is willing to look the other way. Nobody is looking to make trouble but on the other hand when some people start to abuse thing by saying I am running a business here now and I am actually using public property for my weekly or daily weddings.

Councilmember Yukimura: I think everybody has agreed these commercial activities need to be regulated. It is just like how is a shoreline setback determination and a measuring going to really be the way to regulate them.

Mr. Imparato: The point is that the shoreline certification is a way of regulating because if you are conducting your activity on your own property then arguably one (1) set of laws do not apply. If you are conducting your activity on public property a different set of laws apply so you have to know where the line is.

Councilmember Yukimura: That is why you need an SMA permit. Thank you.

Committee Chair Bynum: Any questions? Thank you very much, Carl. Next speaker please.

Ms. Marugame: Felicia Cowden.

FELICIA COWDEN: Hello. My name is Felicia Cowden and I know we are anxious to go. I have a point that I think is important. I am speaking to page 3, Section 8.27.3 basically dealing with the impact on public beach access also a little bit on Item C there relative to the rocky shoreline. What we saw in the presentation regarding the shoreline setback calculations, I appreciate all of the effort that went into it. It happened to be kind of my backyard area and I think there is an inaccurate accretion rate that was presented and I think that the study was very good but it did not take into account human behavior relative to the shoreline reclaiming land that is really beach. And it happens egregiously and I am sure that what happens in Hanalei is not the only place that it happens. We saw some pictures up there and we saw where you see the sand line in the middle of the grass. Well I will tell you that is minor. It can be that highest wash of the highest wave will be forty-five feet (45') into the property lines and what I have watched personally is areas and it will be maybe four (4) contiguous houses, I am not mentioning names, but these are real things and like in about 1999/2000 is one (1) example of where a big landscape company came in and really with bobcats and everything reorganized the beach, planted mature trees, about a week later came in and reclaimed about another fifteen feet (15') and then eventually a whole forty-five feet (45'). It was along four (4) property lines and it was done in a way where it looked really natural. So then there was a...their yard came up like this and there was a drop point out and then *naupaka* and everything along the edge. The area where the picture was where you saw the sand line in that was a conscious effort. There is a little bit of ironwoods that had washed in on a big storm that started to grow but a whole range of houses probably at least six (6) started making sure to have the ironwood in there and then created a low level hedge all along there. Closer to the pier there is about four (4) houses in a row that reclaimed areas of the beach even with sprinkler systems on the sand. This happens at the beginning of the summer. Part of the normal landscape management that happens is cleaning up the mess, repairing the damage but when we hear that there is an accretion rate in Hanalei I say well I do not know that it is natural. Well humans are natural but

it is human created and what the impact to that is that really the highest wash of the highest wave is in the middle of these people's yards and so when you want to run the beach...

Ms. Marugame:

Three (3) minutes.

Ms. Cowden: ...you want to walk the beach in the winter time you cannot do it. These areas where the kids would play and be a part of it, they cannot in the winter time and we get a pretty steep beach right in that area. What I think is very important to this is that when you see four (4) houses do something where you get a nice smooth edge and by the way this work begins about 4:00 p.m. on a Friday in the evening and they do an incredible job putting in mature plants but I consider it an intentional taking and in fact at that time I came in and nicely asked the neighbors about it and said you know what. So they showed me their survey maps but I was looking and those were close to one hundred (100) years old. And so that property line was really far out. And what I am asserting to you is that if we are not careful with what we do that there will be easy strategic ways of creating areas where people cannot get to the beach and I do not think that people mean badly when they are doing it. They are just focused on their own internal needs and most of these people who by on the beach happen to have enough money that it is no big deal to have the routine maintenance of having their yard continuously structured and when I look at these rocky shorelines another community that I am very conscious of is the fishermen and when you are fishing you are following the fish. Often at night you are walking along, walking along, walking along and if these houses are outcropping...because where the fishermen are on those rocky shorelines very typically and security is a big portion of what happens when people build nice big houses in beautiful spots so then it becomes natural ways of living life, natural fishing and food activities becomes suspicious, they do not want the people there, it can be seen as criminal behavior, trespassing if you have to go up an around. So I am not asking for a direct change but I do want to say with all due respect to the wonderful job that was done there. Unless you live right in a certain place and you see the changes maybe you do not know. Maybe it takes time to watch that and I hope than when this Bill is crafted or this Ordinance is crafted that there is a lot of conscious effort to understand that there is an intentional taking of these prime areas and we lose beach access and that is another area where mature trees are routinely put over pathways to where it looks like it was never even there and pretty soon people forget.

Ms. Marugame:

Six (6) minutes.

Ms. Cowden:

Thank you very much.

Committee Chair Bynum: Thank you. Is there anyone else who would like to speak? Seeing none I will call the meeting back to order.

The meeting was called back to order, and proceeded as follows:

Committee Chair Bynum: Any comment before we entertain a motion to defer? Councilmember Kagawa.

Councilmember Kagawa: Thank you, Chair. I will try to keep it quick. You know this past winter on the north shore of 'Oahu we saw huge problems, houses, wall falling into the ocean and I thought to myself, this could happen here soon. Thankfully we have a Bill that is trying to use current science and experts that we have. Thank you, Mr. Conger and Ruby, for your work. I really appreciate the kind of science and knowledge that we really need on this type of Bill because it is very hard to predict erosion, what is going to happen in the future. I think this Bill should be...it complicated and it should be kept as simple as possible, if that makes sense. To address exactly what we are trying to accomplish and provide more clarity, reliability on science that addresses the future changes that we foresee. Why complicate this Bill that is already covered, like activities is already covered by SMA and I understand we are trying to prevent future things that may happen but we can always adjust it when those things happen. Why try and foresee what people may try and get around and take advantage of? Let us take care of this Bill, it is the shoreline problems that may occur and even for addressing the bluffs, scenic view plains, scenic concerns, why do it in this Bill? If we want to address those things and those things are important then let us do a separate Bill that just focuses on that. That would make more sense. What we are doing now is we are trying to complicate really the hard work and efforts of former Councilmember Nakamura and now Councilmember Yukimura. We need to address what has happened on the north shore so it does not happen here to our houses on these new permits that we may be issuing. I think this Bill does it. It really defines as far as a rocky shoreline I like Mr. Conger's presentation. It clearly defines...I think Planning you have a much clearer method of using that language and determine what is a rocky shoreline and what is not. Like what Councilmember Yukimura said if there is any question whether it is rocky or not rocky than it is not rocky. It definitely has to fit all of the needs to be a rocky shoreline or else it is not and I think the group has done a wonderful job in a very difficult Bill. While it may not be perfect we can always adjust it but let us keep the focus and let us improve the Bill that we have now and let us make it easier for our Planning Department to issue permits that are safe for families, protect homes, and as well as protect our beach area and that is what I think the science and experts are trying to help us with on Kaua'i. Thank you, Chair.

Committee Chair Bynum: Councilmember Hooser.

Councilmember Hooser: I am a non-Committee member. May I speak now?

Committee Chair Bynum: That is fine.

Councilmember Hooser: Thank you, Chair and I want to commend you running the meeting today. I thought it was a very healthy and informative discussion and I know it takes time to have these kinds of discussions but I think that the time is well spent and of course the presenters who give us good information and the resources that were here, I thought it was really time well spent. We have a Council that works together sometimes and differs sometimes and I think that is a healthy thing and I see things a little differently than my colleague across the table. I do not see us as trying to add in activities or add in protections for view plains. I see us trying to protect those provisions that are already in the Bill and so with the effort being put before us is not to add things in but it is to take things away. And I see it as well intended but at the end of the day it diminishes existing protections that the public now has. So we are not trying to add in the protection, we are trying to keep these protections...I am trying to keep these protections from being taken away from us. If we need more clarity, which I believe we do on the activities provisions than let us do it. Let us craft the language to make sure it does not impact traditional and cultural practices which I know is not the intent but I do not want to take away protections from the community that are there right now. It is so hard to put in additional protections, to pass laws in the future to take these away and not know the consequences. To take away the one hundred foot (100') setbacks that are in place now for large lots and not know what those consequences are going to be and it is more than just view plains. At the end of the day it is about access and I know there is a provision in there that talks about beach access but it is more than that. It is water access, it is traditional access along the coast and years and years from now we will thank ourselves hopefully and our children and grandchildren will thank us for preserving those one hundred foot (100') setbacks along the coastline. I think by taking away protections, you can say that they are all contained in the SMA but right now we have more, they are contained twice and naturally development interests will want to dismantle existing protections and point to well you can do it over here, you can do it over here, well I like having this little bit of extra protection in my opinion and rather than counting on the State who can change their laws we can have our own provisions. I think the practical implications right now of those provisions are that it does in fact diminish existing protections that are on the table and so I am hopeful that the Committee, I am not on the Committee but I am hopeful the Committee and I would be happy to add my whatever I can to the process will look for ways to adjust the language to make the activities provision one that is workable for the Planning Department and preserve those setbacks on large lots. Thank you very much.

Committee Chair Bynum: Councilmember Chock.

Councilmember Chock: Thank you, Chair. I want to spend my time thanking the group because I know it has been many months, years together working on this. I know it can be tiring, long, and frustrating at times but the important stuff, the work and the discussion that you folks have had I think is what is valuable. I wanted to acknowledge you, Councilmember Yukimura for taking the lead on that. Planning for exactly what we need which is this format to kind of look at things, amendments and existing laws, recommendations side by side and then of course the group. I understand and I want to support what the Planning Department's needs are here in wanting to empower them to get the work that they need to do done and administrate. I would feel more supportive and my request would be that if while looking at activities and as connected to SMA or applicability as related to CZO that I would be able to look at that, to actually see that there are some specific language that we can look towards that will support it so that we are not losing, we are not creating a hole as Mr. Imperato has mentioned because I do not want to leave us open and in the dark. I do believe that there are relationships. What happens on the shoreline affects *mauka* too and so we have to take those things into consideration. There is a connectivity there that is undeniable and should be written such and so I am looking forward to, I know we have two (2) weeks, there is lots more to be done but I think we are moving along as well so I just want to thank you for cleaning it up and moving us in that direction. Thank you, Chair.

Committee Chair Bynum: Councilmember Yukimura, did you want to make any final comments?

Councilmember Yukimura: Yes. First of all I too want to thank you, Committee Chair for this very robust discussion and I want to really say thank you to the working group that has worked for over a year now. It is hard to see the progression when you have been working on it but we have come a long way in terms of many improvements and what was most exciting to me was how everyone was trying to help achieve the other's goal. It turned into a working group that was looking for win/win and looking for ways to address each other's needs and we had a lot of great expertise around the table from all angles. From a citizen perspective, from a developers perspective, from Planning perspective and from coastal zone and expertise as well. Thank you for the long commitment and many hours of time and mind to work on this. I also want to thank your staff. Aida Okasaki right there, Peter Morimoto, and I understand Codie had a big part of putting this together too so thank you for that. I want to say that the issue of activities in the other Counties I would like to ask Planning Department to talk to the other Counties. I think they have activities in their rules and regulations because the State statute has it in the rules and regulations and have put us in an awkward position in knowing that setbacks have specific criteria and purpose but the State Legislature, I believe unthinkingly put both in there and we are trying to build some rational basis into this and I think Councilmember Chock request also to show how activities are

actually addressed in our SMA law would be...is a good request and we should honor that too. So, two (2) jobs for Planning in the interim. I think we will have a robust discussion in our decision making. I do believe the intention was protection and there is greater protection in these new sets of amendments and I think this will continue to be one of the strongest laws in the country.

Committee Chair Bynum: I would like to thank everybody too, especially some of the people that were not here today like Chip Fletcher, Dolan Eversole, Dennis Wong are kind of my go to guys for years now on these issues and as I mentioned when this Bill came I was a new Councilmember and I am extremely proud of this Bill and I want to put this in context. We are going to have a Bill, it is the nature of what we discuss that we focus on the areas of disagreement but there is a whole lot in here that this group has already done that is a vast improvement and there was a lot of give and take and that is very clear from developers and others and so I want to acknowledge that. So it is just the nature that we are going to focus on the areas where we are not clear but this is a landmark Bill and I believe that it will be a much better Bill when we finish this process. For myself I am less concerned about activities. I am a little more convinced that there are other ways to deal with that but I am going to continue to follow-up in the intervening weeks to understand that better. What came to us from the Planning Department, from the Planning Commission is much less complicated than this bright line determination that has been put in here which I am very uncomfortable with and I am going to have to be convinced that does not just further complicate things when there is a much simpler way to address these concerns. I am going to stick by what I said from the beginning, this Bill is a Setback Bill. It is not a Coastal Hazard Bill. It has a primary purpose to protect from coastal hazards but it was always a Bill for me and I read from the purpose about esthetics, about scenic beauty, about recreation that occurs in the coastal zone and it is our legacy. I gave an example in Po'ipū it is a great one where somebody built a house fifteen (15)...they bought a bunch a boulders and built a house fifteen feet (15') so they could have views from the first and second floor and it sticks out like a sore thumb. And when it was happening we said nothing we can do, nothing we can do well that is going to happen again if we do not address these coastal issues and some very special place to people on Kaua'i we are going to look up and see something like that again. It is too important. I love what Mr. Hooser...I think it was Mr. Hooser...or not it was Carl, sorry. If there is only one (1) then it is important and we cannot quantify so for me that is the big issue but I do not want to take away. We are adding twenty feet (20') for...and developers agreed to that. I want to really acknowledge that group. That working group is very robust and very diverse and that is the way we should work. Thank you very much. I am going to entertain a motion to defer then we are going to...I am also going to entertain a motion to adjourn which we have been neglecting to do apparently and then we will return at 2:00 p.m. for our special council meeting.



Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Yukimura, and carried by a vote of 4:0:1 (*Councilmember Rapozo was excused*), Bill No. 2461, Draft 1, was deferred.

Councilmember Kagawa moved to adjourn the Planning Committee Meeting, seconded by Councilmember Yukimura, and carried by a vote of 4:0:1 (*Councilmember Rapozo was excused*).

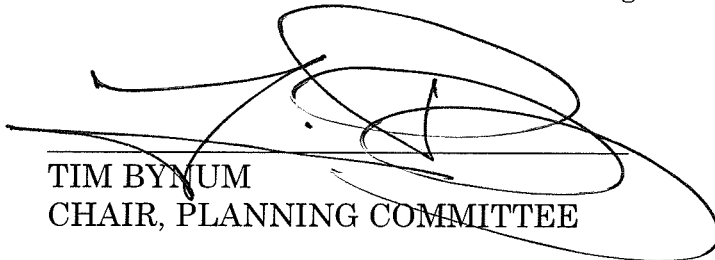
There being no further business, the meeting was adjourned at 1:00 p.m.

Respectfully submitted,



Lori L. Marugame  
Council Services Assistant I

APPROVED at the Committee Meeting held on November 12, 2014:



TIM BYNUM  
CHAIR, PLANNING COMMITTEE